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In the Supreme Court of the United States

OCTOBER TERM, 1961

No. 532

C. D. CALBECK, DEPUTY COMMISSIONER, BUREAU OF EMPLOYEES' COMPENSATION, UNITED STATES DEPARTMENT OF LABOR, PETITIONER

v.

THE TRAVELERS INSURANCE CO. AND LEVINGSTON SHIPBUILDING CO.

P. J. DONOVAN, DEPUTY COMMISSIONER, BUREAU OF EMPLOYEES' COMPENSATION, UNITED STATES DEPARTMENT OF LABOR, PETITIONER

v.

AVONDALE SHIPYARDS, INC.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

BRIEF FOR THE PETITIONERS

OPINIONS BELOW

The findings and awards of the deputy commissioners (R. 10–13, 91–94) are not reported. The opinion and order of the District Court for the Western District of Louisiana (R. 38–41) and the order of the District Court for the Eastern District of Louisiana (R. 95–96) are also not reported. The

opinions of the Court of Appeals for the Fifth Circuit (R. 43–55, 98–99) are reported at 293 F. 2d 52 and 293 F. 2d 51.

JURISDICTION

The judgments of the court of appeals were entered on July 13, 1961 (R. 56, 99–100). By order dated October 5, 1961, Mr. Justice Black extended the time for filing a petition for a writ of certiorari to and including November 3, 1961 (R. 100). The petition was filed on November 3, 1961, and granted on December 18, 1961 (R. 101; 368 U.S. 946). The jurisdiction of this Court rests upon 28 U.S.C. 1254.

QUESTION PRESENTED

Whether injuries sustained by employees working on vessels under construction and afloat upon navigable waters are excluded from the coverage of the Longshoremen's and Harbor Workers' Compensation Act because recovery for such injuries may be had under a state workmen's compensation law.

STATUTES INVOLVED

The Longshoremen's and Harbor Workers' Compensation Act, as amended, 33 U.S.C. 901, *et seq.*, provides in pertinent part (as it appears in the United States Code):

> § 902 [Section 2 of the Act]. *Definitions.*
>
> When used in this chapter—
>
> * * * * *
>
> (2) The term "injury" means accidental injury or death arising out of and in the course of employment * * *.
>
> * * * * *

(4) The term "employer" means an employer any of whose employees are employed in maritime employment, in whole or in part, upon the navigable waters of the United States (including any dry dock).

* * * * *

§ 903 [Section 3 of the Act]. *Coverage.*

(a) Compensation shall be payable under this chapter in respect of disability or death of an employee, but only if the disability or death results from an injury occurring upon the navigable waters of the United States (including any dry dock) and if recovery for the disability or death through workmen's compensation proceedings may not validly be provided by State law. No compensation shall be payable in respect of the disability or death of—

(1) A master or member of a crew of any vessel, nor any person engaged by the master to load or unload or repair any small vessel under eighteen tons net; or

(2) An officer or employee of the United States or any agency thereof or of any State or foreign government, or of any political subdivision thereof.

(b) No compensation shall be payable if the injury was occasioned solely by the intoxication of the employee or by the willful intention of the employee to injure or kill himself or another.

§ 920 [Section 20 of the Act]. *Presumptions.*

In any proceeding for the enforcement of a claim for compensation under this chapter it

shall be presumed, in the absence of substantial evidence to the contrary—

(a) That the claim comes within the provisions of this chapter.

* * * * *

STATEMENT

These cases involve claims for compensation under the Longshoremen's and Harbor Workers' Compensation Act [1] for injuries to employees of employers covered by the Act, sustained upon navigable waters while the employees were working on vessels under construction and afloat upon navigable waters. The facts were found by the Deputy Commissioner in each case and are not in dispute.

1. *The Travelers Insurance Case.*—The Levingston Shipbuilding Company owns and operates a shipyard on the Sabine River, a navigable body of water, between Orange, Texas, and Calcasieu Parish, Louisiana (R. 15, 19, 28). The work at the shipyard consists both of building new vessels and repairing completed vessels (R. 29–30). The employees at the yard perform both kinds of labor, frequently working on a repair project on one day and upon the construction of a new vessel the next (R. 30). Since Levingston Shipbuilding Company had employees engaged in maritime employment upon navigable waters, it was an employer subject to the provisions of the Long-

[1] 33 U.S.C. 901, *et seq.*, often referred to as "the Longshoremen's Act."

shoremen's Act (33 U.S.C. 902(4), *supra*, p. 9) (R. 10–11, 15). Its liability under that Act was insured by the Travelers Insurance Company (R. 10–11).

Roger McGuyer was engaged by the employer as a welder at an average wage of $81 a week. Like the other welders, and like the shipfitters, helpers, laborers, electricians, painters and other craftsmen and apprentices, he was expected to use his skill both to repair completed vessels and to complete unfinished vessels (R. 11, 30, 31–34). The work of each of the craftsmen is basically the same whether the vessel is being repaired or is being completed (R. 34).

On July 8, 1957, McGuyer was working on the Louisiana side of the shipyard aboard an uncompleted drilling barge. The barge had been launched and was floating on the navigable waters of the Sabine River, while its superstructure was under construction (R. 10–11). While he was welding on the port side barge's deck, an accumulation of gases in a tank forty feet away exploded, throwing a bucket through the air which struck him and caused severe head injuries and fractured both arms and both legs (R. 11). On July 16, 1957, he died from a cerebral concussion which resulted from the accident (R. 11). McGuyer was survived by three dependents, his wife, who was then almost thirty-four, and two infant sons, who were aged twenty months and one month, respectively (R. 11–12).

Although the employer was not given written notice of the injury and death within thirty days, he had actual knowledge of the facts and was not prejudiced

in any way by the absence of written notice (R. 11). In accordance with the provisions of the Longshoremen's Act, the employer had furnished McGuyer with medical care from the date of his injury until the date of his death (R. 11). The employer and insurance carrier also paid the McGuyers $153.57 under the Texas Workmen's Compensation Act (R. 12).

The state workmen's compensation act applicable to McGuyer's death would probably be that of Texas, although the injury occurred within Louisiana. See *Kelly* v. *Summers*, 210 F. 2d 665, 673 (C.A. 10). The Texas Workmen's Compensation Law provides that the maximum compensation for death is $35 a week for a period of 360 weeks, or a gross amount of $12,600. V.R.C.S., Art. 8306, § 8. The Longshoremen's Act, however, provides *maximum* benefits for an employee's death of two-thirds of the employee's average wages (33 U.S.C. 909). Since McGuyer had two children, his wife and children would receive $52.65 per week under the Act (R. 12) (33 U.S.C. 909). More specifically, each of the two children would receive $12.15 a week for the sixteen-year and eighteen-year periods while the children were under eighteen, and Mrs. McGuyer would receive $28.35 a week for the years of her widowhood—which if she did not remarry and lived her normal life expectancy would be for forty-two years[2] (R. 12). Accordingly, the

[2] Mrs. McGuyer, who was almost thirty-four at the time of her husband's death, had a life expectancy of approximately forty-two years. U.S. Dept. of Health, Education, and Welfare, Public Health Service, National Office of Vital Statistics, *Vital Statistics of the United States*, 1959, Section 5, "Life Tables," pp. 5-6.

amount due for McGuyer's death would be approximately $83,500, which is 6.6 times more than the sum recoverable under the Texas Workmen's Compensation Law.[3]

Mrs. McGuyer filed a formal claim for compensation under the Longshoremen's Act, after having filed a claim under the Texas Workmen's Compensation Act which was expressly subject to the claim filed under the federal law (R. 3). At the hearing before the Deputy Commissioner, the employer conceded the employee-employer relationship, the injury upon navigable waters in the course of employment, and all the other facts imposing liability, except the coverage of the Longshoremen's Act and the identity of the beneficiaries (R. 26). After a full hearing the Deputy Commissioner found the facts as set forth above, except that he found that the injury had occurred in Texas (R. 15–16). He rejected the claims on the ground that (R. 16):

> It has not been held that the work on an uncompleted vessel comes within the provisions of the Longshoremen's and Harbor Workers' Act.

The McGuyers instituted suit for judicial review in the District Court for the Eastern District of Texas. Upon a motion to dismiss, the case was remanded to the Deputy Commissioner for reconsideration as to the place of the injury. Upon remand, the parties stipulated that the injury occurred in

[3] In our petition for certiorari (p. 6), we accepted the computation made by Mrs. McGuyer's counsel in the court of appeals. However, that computation understated the amount due.

Louisiana, and the Deputy Commissioner modified his original award to reflect that fact (R. 18–19).

The McGuyers then brought suit for review in the District Court for the Western District of Louisiana. After various procedural motions, the Deputy Commissioner filed an answer on January 11, 1960, admitting the allegations of the complaint and asking that the case be remanded (Civil Action No. 7507, W.D. La.). On April 20, 1960, the district court granted the motion and remanded the case to the Deputy Commissioner "to permit him to make findings and conclusions in accordance with the facts and the law" (R. 10).

Upon remand, the Deputy Commissioner entered a new order, reciting the facts and making an award of compensation under the Longshoremen's Act to the McGuyers (R. 10–13). The benefits awarded were $28.35 per week to the widow during widowhood, and $12.15 per week for each child until the age of eighteen, plus disability and funeral benefits, less the amount already paid under the Texas Act (R. 12–13).

The employer and the insurance carrier brought suit for judicial review in the District Court for the Western District of Louisiana. Upon motions for judgment on the administrative record, the district court rendered a short opinion, upholding the award and the coverage of the Longshoremen's Act upon the basis of decisions of this Court and the courts of appeals (R. 38–40).

2. *The Avondale Shipyards case.*—Avondale Marine Ways, Inc. (the predecessor to Avondale Shipyards, Inc., the respondent here), operated two shipyards near

New Orleans, Louisiana, where it built and repaired vessels. At the Harvey yard, the principal work was repairing completed vessels. At the Avondale yard, which is located on the Mississippi River, the greater part of the work consisted of fabrication of machinery and structural steel and the construction of new vessels, but repair work was also performed there (R. 87). Since it had employees in both plants engaged in maritime employment upon navigable waters, Avondale Marine Ways was an employer subject to the provisions of the Longshoremen's Act (33 U.S.C. 902(4)), and was qualified as a self-insurer under that Act (R. 91–92).

Minas Aizen was hired by Avondale as a tack welder in December 1955, having previously worked for the firm during the second half of 1952 (R. 92). His average weekly wage was $89.32 (R. 93). Although he worked on the construction of new vessels from December 1955 until August 1956, it was the practice of the yard to assign workers who were principally engaged in new construction to repair projects when their services were required in such work (R. 87–88).

On August 11, 1956, Minas Aizen was engaged in welding work upon an oil drilling barge intended for use in offshore operations. The barge had been launched and had been towed to a fitting dock, where she was floating on the navigable waters of the Mississippi River; she had not been completed (R. 92). When Aizen placed an "eye-lug welded to pipe" in a position for welding with a "come-along", the "eye-lug" broke and caused a piece of steel to strike him

on the head, knocking him off the scaffold onto the deck of the barge below, and then into the river (R. 76–77). He suffered a fractured skull, brain damage, a broken right forearm, left wrist, arm, and hip, and also body contusions (R. 77, 83). As a result of these injuries, Aizen became totally and permanently disabled (R. 93).

Avondale had immediate knowledge of the accident and so was not prejudiced by Aizen's failure to file written notice within the prescribed thirty-day period (R. 89, 93). Avondale furnished Aizen with all medical, surgical, and hospital treatment necessary, at an expense of approximately $7,000 (R. 89). Avondale also paid Aizen $35 a week by checks which indicated that they represented payments under the Louisiana State Workmen's Compensation Act, plus additional periodic checks in varying amounts for a total of $3,830, or an average of approximately $21.30 a week, which checks were marked "advance on compensation" (R. 89–90, 93). These payments were made without any claim being filed by Aizen with any agency of the State of Louisiana.[4]

The maximum payment for total disability for Aizen under the Louisiana Workmen's Compensation Act would be $35 a week, for a period of 400 weeks, or a total amount of $14,000. La. R.S. 23: 1202, 1221. Under the Longshoremen's Act, however, he was entitled to $54 a week for life. 33 U.S.C. 906(b), 908

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[4] Claimants under the Louisiana Workmen's Compensation Act may assert their claims in a judicial proceeding without any prior administrative proceeding. La. R.S. 23: 1311; *Thebodeaux* v. *McDermott & Co.*, 276 F. 2d 42, 48 (C.A. 5).

(a). Since he was twenty-five years old at the time of his injury, he could expect to receive $54 a week for approximately forty-eight years,[5] for a total of $134,784, or more than 9.6 times the amount receivable under the state act.[6]

Aizen filed his formal claim for compensation under the Longshoremen's Act on November 7, 1958 (R. 76–78). Avondale conceded all of the elements of liability, except that the injury was covered by the Longshoremen's Act (R. 78–79). Avondale subsequently urged that, by receiving the checks, Aizen had elected to receive compensation under the state act (R. 69). The facts were submitted to the Deputy Commissioner in the form of a stipulation by the parties (R. 86–90). Upon those facts, the Deputy Commissioner, on January 27, 1960, ruled that the claim was within the coverage of the federal Act, and awarded Aizen compensation at the maximum rate of $54 a week plus medical benefits, less the amounts which the employer had already paid (R. 91–94).

Avondale brought suit in the District Court for the Eastern District of Louisiana for review of this award. Upon motions for judgment and the administrative record, the district court entered judgment without opinion in favor of the employee and Deputy Commissioner (R. 95–96).

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[5] U.S. Dept. of Health, Education, and Welfare, Public Health Service, National Office of Vital Statistics, *Vital Statistics of the United States*, 1959, Section 5, "Life Tables," pp. 5–6.

[6] In our petition for certiorari (p. 6), we erroneously computed his compensation on the basis of a life expectancy of only forty years.

3. *The Decisions of the Court of Appeals.*—The Court of Appeals for the Fifth Circuit reversed the judgments in both cases. In its principal opinion in the *Travelers Insurance* case, the court of appeals held that, although longshoremen working on a ship and repairmen working on a completed vessel are covered by the Longshoremen's Act, "persons working on an uncompleted vessel afloat but under construction" are covered only by state workmen's compensation laws (R. 55). The court emphasized that Section 903(a) of the Longshoremen's Act (*supra*, p. 3) provides that compensation thereunder "shall be payable * * * only if * * * recovery for the disability or death through workmen's compensation proceedings may not validly be provided by State law" (R. 46). It stated that, five years before the enactment of the Longshoremen's Act in 1927, this Court, in *Grant Smith-Porter Ship Company* v. *Rohde*, 257 U.S. 469, held that a State "could provide workmen's compensation to a person injured while working on an uncompleted vessel then under construction and afloat in navigable waters," and that "the line which the Court drew in the pre–1927 days" between "uncompleted construction versus repair of a completed vessel" "was the line which Congress adopted in § 903(a) * * *" (R. 46, 47; see R. 50). In Section 903(a), the Court said, Congress "adopted" the "categorical pre-1927 holding * * * that injuries on an uncompleted vessel afloat but still under construction may, in the words of the statute, be 'validly * * * provided by state law'" (R. 53).

SUMMARY OF ARGUMENT

The employees, who worked in shipyards which both repaired and constructed vessels, were injured while working on navigable waters upon a vessel which were launched but not yet completed. We submit that in these circumstances the Longshoremen's and Harbor Workers' Act is applicable.

A. Section 3(a) of the Longshoremen's Act provides that compensation under the Act "shall be payable * * * only if the disability or death results from an injury occurring upon the navigable waters of the United States * * * and if recovery for the disability or death through workmen's compensation proceedings may not validly be provided by State law." The latter provision does not mean that, whenever a state workmen's statute may constitutionally be applied, the federal Act is inoperative. Instead, Section 3(a) precludes coverage under the Act only if state workmen's compensation applies by force of state law itself, and not by supplementation of federal maritime law under the so-called "local concern" doctrine. Thus, the Longshoremen's Act applies to all injuries occurring at places within admiralty tort jurisdiction to employees of employers covered by the Act and excludes only injuries occurring within state tort jurisdiction.

1. The background of the Longshoremen's Act was a series of cases decided by this Court concerning the application of state law within admiralty tort jurisdiction. In *Southern Pacific Co.* v. *Jenson*, 244 U.S. 205, the Court ruled that, in the absence of federal legislation, federal maritime law occupied the area of admiralty jurisdiction conferred upon the

federal government by Article III, Section 2, of the Constitution. The Court held that state workmen's compensation laws could not constitutionally be applied to an injury occurring upon navigable waters within admiralty jurisdiction to an employee engaged in a maritime activity, because to do so would destroy the uniformity of maritime law which the Constitution was intended to establish. Subsequently, the Court formulated the "local concern" doctrine of admiralty law which permitted recovery under state workmen's compensation laws for injuries occurring within admiralty tort jurisdiction to an employee whose activities and contract of employment were matters of "local concern," not directly related to navigation or commerce. The Court reasoned that in these circumstances the adoption of state procedures by admiralty law would not destroy the uniformity required by the Constitution. *Grant Smith-Porter Ship Co.* v. *Rohde,* 257 U.S. 469. Under the "local concern" doctrine, employees hired for the construction of new vessels could receive state workmen's compensation benefits for injuries incurred upon navigable waters arising out of such construction, but employees hired for the repair of existing vessels could not receive such benefits for injuries upon navigable waters arising out of repair work. And the Court held that state workmen's compensation could be provided by direct operation of state law for injuries occurring on extensions of land into navigable waters, without reference to the "local concern" doctrine of maritime law, because injuries upon land and extensions of land were within the then rec-

ognized area of non-maritime state jurisdiction. *Industrial Commission* v. *Nordenholt Corp.*, 259 U.S. 263.

2. The legislative history of the Longshoremen's Act reveals Congress' intent to provide compensation for all injuries to employees occurring at places within traditional admiralty tort jurisdiction, regardless whether the injury would also be compensable under a state workmen's compensation act by virtue of the "local concern" doctrine.

As originally drafted, the Senate bill would have applied to "any employment performed on a place within the admiralty jurisdiction of the United States, except employment of local concern and of no direct relation to navigation or commerce * * *". It was thus clearly intended to exclude from coverage injuries upon navigable waters which were covered by state compensation benefits under the "local concern" doctrine. In apparent response to criticisms that the language would breed litigation and would result in various anomalies, the Senate Judiciary Committee reported a bill, which, like the bill as enacted, provided for coverage of injuries upon navigable waters if workmen's compensation benefits "may not validly be provided by State law." As the change in statutory language indicated, this limiting clause was apparently designed to exclude only injuries upon [redacted] fixed extensions of land which, although occurring upon navigable waters, were not then recognized as "within the maritime jurisdiction of the United States." S. Rept. No. 973, 69th Cong., 1st Sess., p. 16.

The House Judiciary Committee modified the Senate provision to include virtually all injuries to am-

phibious workers within maritime jurisdiction. Because of objections to the inclusion of seamen, the coverage provision was amended to its present form. But the debates indicate that this last amendment was not intended to exclude any category of injuries occurring within admiralty tort jurisdiction except those to seamen.

3. Under the controlling decisions of this Court rendered since the passage of the Longshoremen's Act, the Act applies to injuries occurring at all places within admiralty tort jurisdiction.

In *Davis* v. *Department of Labor*, 317 U.S. 249, the Court upheld an award of state workmen's compensation under the "local concern" doctrine, because of the presumption that the state law was constitutional. At the same time, the Court recognized that if the claimant had sought compensation under the federal Act he might well have come within its coverage because of the statutory presumption of coverage under the Act (Section 20). Thus, the Court in effect held that, when a worker was injured in the "twilight zone" where the federal or state laws were not clearly inapplicable, he could elect to recover compensation under either.

Applying the *Davis* decision, this Court has held that the "twilight zone" has a very broad scope and that therefore state workmen's compensation laws are applicable to an injury even though it occurred, under both the pre- and post-1927 precedents, within the area of exclusive federal jurisdiction. *E.g., Bethlehem Steel Co.* v. *Moores*, 335 U.S. 874. In *Avondale Marine Ways* v. *Henderson*, 347 U.S. 366, the Court

upheld an award under the Longshoremen's Act for an injury incurred in the repair of a vessel upon a marine railway on land 400 feet from navigable waters, despite the fact that the pre-1927 precedents were clear that state law had exclusive jurisdiction over injuries incurred in maritime activities on land or extensions of land (see *Industrial Commission* v. *Nordenholt Corp., supra*). This was a holding that an injury within traditional state jurisdiction, and therefore covered by state workmen's compensation laws under state law in itself (not under the "local concern" doctrine), with still within the "twilight zone" and covered by the Longshoremen's Act. And in *Pennsylvania R.R. Co.* v. *O'Rourke*, 344 U.S. 334, the Court held that, regardles of the nature of the individual employee's activity at the time of the accident, the Longshoremen's Act applied if the injury occurred upon navigable waters.

The court of appeals below decided that the injuries here were excluded from coverage under the Longshoremen's Act because, under the "clear" pre-1927 decisions of this Court, the activities of the employees at the moment of their injuries were within the "local concern" doctrine. Therefore, the court reasoned, the federal Act does not apply because compensation could be provided "by State law." That ruling is inconsistent with the decisions of this Court described above which sustain Longshoremen's Act coverage for injuries upon navigable waters within maritime tort jurisdiction, without regard to the "clear" pre-1927 precedents regarding the applicability of state work-

men's compensation laws or the nature of the employee's activity at the moment of his injury.

The principles announced and applied in *Davis*, *Avondale Marine Ways*, and *O'Rourke* have, as a practical matter, worked extremely well. They have provided clear guidelines to the lower courts and largely achieved the overriding legislative goal of prompt and sure relief to injured employees "without the delay and expense" entailed by litigation. On the other hand, the construction adopted by the court of appeals would breed litigation, engender anomalies, and tend to frustrate the legislative purpose of swift and certain relief.

4. Until the decisions in these cases below, the decisions of the courts of appeals uniformly held that injuries within admiralty tort jurisdiction are covered by the Longshoremen's Act. We know of no other case since the *Davis* decision in 1942 in which an employee injured upon navigable waters has been denied recovery under the Act because the nature of his employment or activity at the time of injury was a matter of "local concern" and therefore his injury could be covered by a state compensation statute.

5. The administrative practice under the Act is inconclusive. Only one prior ruling by a Deputy Commissioner denying a claim for injury to a construction worker upon navigable waters has been challenged in the courts and we have been unable to determine if any additional administrative rulings have been made. But even if the administrative practice were far clearer and stronger than it is, we

do not believe that this should prevent a change in interpretation to correct a clear error in construing the Act.

B. Even if coverage under the Longshoremen's Act does not extend to all injuries upon navigable waters, within traditional maritime tort jurisdiction, to employees of employers subject to the Act, the Act could be applied here because the injuries were within the twilight zone of overlapping state and federal coverage.

1. There is substantial doubt under the pre-1927 precedents of this Court whether state workmen's compensation acts, as supplementing admiralty law under the "local concern" doctrine, would apply to these cases. Although *Grant Smith-Porter Ship Co.* v. *Rohde*, *supra*, held that the "local concern" doctrine would sustain the application of state compensation laws for injuries upon navigable waters to employees engaged solely for the non-maritime work of constructing new ships by employers who engaged in such construction, there was no authoritative pre-1927 precedent as to whether the "local concern" doctrine would sustain such recovery if the contract of employment related to both maritime (repair) and non-maritime (construction) work. Indeed, the pre-1927 "local concern" decisions revealed only that the application of that doctrine by admiralty law required a painstaking factual analysis of the impact in any given case of state law on the uniformity required of maritime law.

2. Even if the pre-1927 precedents had "clearly" held that state compensation acts would have been ap-

their employments had a direct relationship to navigation and commerce. *Great Lakes Dredge & Dock Co.* v. *Kierejewski*, 261 U.S. 479 (jurisdiction sustained for a libel in admiralty, based on a local death act, for death occurring on navigable waters during the repair of a completed vessel); *Gonsalves* v. *Morse Dry Dock & Repair Co.*, 266 U.S. 171 (same result for death while repairing a completed vessel which was resting in a floating dry dock). Thus, these cases in effect held that, while the injuries occurred within federal admiralty jurisdiction and therefore maritime law applied, certain elements of local law could be adopted. On the other hand, the Court in *Kierejewski* carefully distinguished *Rohde* (where the worker was hired for and engaged in construction) on the ground that there "the matter was purely local," while here navigation and commerce are directly involved. Thus, the Court made clear that state workmen's compensation statutes would not be permitted by the "local concern" doctrine to apply where the worker was injured while engaged in repairs. Accord, *Robins Dry Dock & Repair Co.* v. *Dahl*, 260 U.S. 449.*

The intricacies and fine distinctions involved in the application of the "local concern" doctrine are vividly illustrated by *Messel* v. *Foundation Co.*, 274 U.S. 427, a case which was before this Court at the time that the Longshoremen's Act was being considered and passed by Congress. In that case a boilermaker's

* In *Robins* the Court held that a local scaffolding law could not validly apply where the worker was injured while engaged in repairs on a completed vessel because, unlike in *Rohde*, "[t]his matter was not of mere local concern * * * but had direct relation to navigation and commerce * * *." 266 U.S. at 457.

helper was employed to work in building new vessels and repairing completed vessels. He was aboard a steamship afloat on the Mississippi River at New Orleans, building an additional eight feet on the smokestack, when he was seriously injured by steam escaping from a pipe running from the engine room. He brought suit in the state courts for negligence under local law, and, in the alternative, for compensation under the state workmen's compensation act. The state courts denied recovery on the ground that the nature of the contract, employment, and injury rendered the injury a maritime tort, compensable only in a federal admiralty court. This Court agreed that the nature of the employment and the injury were maritime, and that the state workmen's compensation act could not apply, but ruled that the "saving to suitors" clause of the Judiciary Act of 1789 (Section 9, 1 Stat. 77) permitted a tort suit based on federal admiralty law in a state court. 274 U.S. at 433.

2. The Legislative History of the Longshoremen's Act Reveals Congress' Intent to Provide Compensation for All Injuries to Employees Occurring at Places within Recognized Admiralty Tort Jurisdiction, Regardless Whether the Injury Would Also Be Compensable under a State Workmen's Compensation Act by Virtue of the "Local Concern" Doctrine

a. The Senate Hearings and Passage.—Although there had been repeated efforts to have Congress adopt legislation which would provide longshoremen and other amphibious workers with the benefits of a federal workmen's compensation act, the pertinent history of the Longshoremen's Act begins in 1926, with

plicable in these circumstances, the decisions of this Court show that the "twilight zone" of legitimate doubt is not restricted to the pre-1927 precedents. Thus, compensation under the Longshoremen's Act has been upheld as within the "twilight zone" in a situation where, prior to 1927, it was clear that workmen's compensation benefits could validly be provided by state law. *Avondale Marine Ways* v. *Henderson, supra.* Conversely, compensation awards under state acts have been upheld, as within the "twilight zone," for injuries which, prior to 1927, would have been within the exclusive domain of federal maritime law. *Bethlehem Steel Co.* v. *Moores, supra.*

Regardless of the clarity of the precedents in 1927, the claims made here were within the area of legitimate doubt at the time the claims were made. The reasonableness of the claim that the Longshoremen's Act applied to these injuries is demonstrated by the legislative history of the Act, the previous decisions of this Court, and the decisions of the two Deputy Commissioners and two district courts below. In addition, prior decisions of the Court of Appeals for the Fifth Circuit had clearly indicated that cases within the "local concern" doctrine were nevertheless within the coverage of the Longshoremen's Act; and it was the opinion of the commentators and of other courts of appeals that an employee's election to recover Longshoremen's Act compensation for an injury upon navigable waters within admiralty tort jurisdiction would be sustained. The reasonableness of claimants' belief that they were covered by the Longshoremen's Act brings the injuries here within the "twilight zone," and, therefore,

under *Davis* v. *Department of Labor*, *supra*, the awards should be sustained.

ARGUMENT

THE LONGSHOREMEN'S ACT COVERS INJURIES OCCURRING UPON NAVIGABLE WATERS TO EMPLOYEES OF SHIPYARDS ENGAGED IN BOTH THE REPAIR OF EXISTING VESSELS AND THE CONSTRUCTION OF NEW VESSELS, REGARDLESS WHICH TYPE OF WORK THE EMPLOYEE WAS ENGAGED IN AT THE MOMENT OF INJURY

The employees in these two cases worked in shipyards which both repaired and constructed vessels. The claims sought to obtain compensation under the Longshoremen's and Harbor Workers' Compensation Act for injuries sustained upon the navigable waters of the United States while working upon a vessel which was launched but not yet completed. The employers were concededly subject to the Act, and the injuries, in view of their locus, were concededly within traditional federal maritime tort jurisdiction.

The court of appeals reversed the awards of compensation made by two Deputy Commissioners and sustained by two district courts on the ground that Section 3(a) of the Act, 33 U.S.C. 903(a), *supra*, p. 3, precludes recovery. Section 3(a) provides that compensation under the Act "shall be payable * * * only if the disability or death results from an injury occurring upon the navigable waters of the United States * * * and if recovery for the disability or death through workmen's compensation proceedings may not validly be provided by State law." The court of appeals reasoned that Congress had intended in Section 3(a) to make state compensation acts the

exclusive remedy for all injuries to which such acts were "clearly" applicable prior to passage of the federal Act in 1927; that state workmen's compensation acts were applicable, prior to the adoption of the Longshoremen's Act in 1927, under the "local concern" doctrine of admiralty to many injuries within traditional admiralty jurisdiction; and that the "local concern" doctrine made state workmen's compensation legislation "clearly" applicable to a person injured while working on an uncompleted vessel afloat on navigable waters.

The government submits, on the other hand, that Congress intended in Section 3(a) to preclude recovery under the Longshoremen's Act only for injuries beyond admiralty jurisdiction, which are directly within the jurisdiction of the State—*i.e.*, where workmen's compensation benefits are wholly provided "by State law," and not where the state law applies only by the tolerance of the admiralty. In other words, in our view, the federal law applies under these circumstances, even though the modified doctrine of *Southern Pacific Co.* v. *Jensen* would not exclude state law from this portion of the maritime jurisdiction because the matter, though maritime, was of local concern. Therefore, Section 3(a) excludes only injuries within the recognized jurisdiction of the States, such as injuries occurring on land and extension of land. Here the injuries occurred upon navigable waters and under *Southern Pacific Co.* v. *Jensen*, 244 U.S. 205, and succeeding cases, occurred within the tort jurisdiction of admiralty; therefore Section 3(a) does not bar recovery.

Accordingly, we will first show that the Longshoremen's Act, as intended by Congress and authoritatively construed by this Court, provides benefits for all injuries occurring within traditional admiralty jurisdiction to employees of employers who are subject to the Act because they have workers engaged in maritime employment on navigable waters. Alternatively, we will show—assuming, as the court of appeals held, that the Longshoremen's Act does not cover injuries within admiralty jurisdiction which prior to 1927 "clearly" would have been compensable under state workmen's compensation acts through the "local concern" doctrine—that the injuries here were not clearly within the "local concern" doctrine. Instead, since they occurred within the "twilight zone" of legitimate doubt in which both state and federal workmen's compensation acts may be applicable, they were covered by the Longshoremen's Act under the principles announced in *Davis* v. *Department of Labor*, 317 U.S. 249.

A. THE LONGSHOREMEN'S ACT APPLIES TO ALL INJURIES OCCURRING AT PLACES WITHIN ADMIRALTY JURISDICTION TO EMPLOYEES OF EMPLOYERS SUBJECT TO THE ACT

The first issue before the Court is whether the Longshoremen's Act extends to all injuries to employees of employers subject to the Act who are injured upon navigable waters within maritime jurisdiction, including injuries occurring during the construction of vessels which have been launched but not completed. We submit that the legislative history of the Act and the decisions of this Court demonstrate that the Act provides relief in these circumstances.

1. The Background of the Longshoremen's Act—Workmen's Compensation, Admiralty Jurisdiction, and the "Local Concern" Doctrine

As a result of the industrial revolution the number of injuries to workers in the course of their employment greatly increased during the nineteenth century. Because of such doctrines as the fellow-servant rule, contributory negligence, and assumption of risk, the common law provided costly, slow, and uncertain remedies for the injured workman or his survivors. When in the last decade of the nineteenth century, accounts of the German system of social insurance (adopted between 1883 and 1887) and the British Compensation Act of 1897 became available in this country, they were intensively studied and, with modifications, began to be adopted by the federal and state legislatures. See 1 Larson, *The Law of Workmen's Compensation*, §§ 4.10–5.20, pp. 23–38.

New York adopted the first comprehensive workmen's compensation act in 1910, with compulsory coverage for certain "hazardous" employments. In 1911, however, the New York Court of Appeals held the act to be in violation of the state and federal constitutions, since it provided for the imposition of liability upon the employer without fault, which was deemed to be a taking of property without due process of law.[1] *Ives* v. *South Buffalo Railway*, 201 N.Y. 271,

[1] Other state courts had reached the same result in regard to two earlier laws pertaining to miners. 1 Larson, *The Law of Workmen's Compensation*, § 5.20, p. 37. An Act providing similar benefits for certain federal employees had been adopted in 1908 (35 Stat. 556), but was apparently not subjected to constitutional attack.

94 N.E. 431. After an amendment to the New York constitution in 1913, New York reenacted the compulsory workmen's compensation law. The Act was again challenged on federal constitutional grounds, and was considered by this Court during 1916 Term together with similar challenges to a compulsory workmen's compensation act of the State of Washington, and to an elective act enacted in Iowa. By this time elective workmen's compensation laws had been adopted by the legislatures and sustained by the courts of at least eleven other states. *Hawkins* v. *Bleakly*, 243 U.S. 210, 212. Early in 1917 this Court sustained each of the acts before it as consistent with the federal constitution. *New York Central R. Co.* v. *White*, 243 U.S. 188; *Hawkins* v. *Bleakly, supra; Mountain Timber Co.* v. *Washington*, 243 U.S. 219.

During the same Term, however, the Court held unconstitutional the application of the New York Workmen's Compensation Act to an injury occurring upon a vessel afloat on navigable waters to a longshoreman engaged in unloading the cargo of a vessel. *Southern Pacific Co.* v. *Jenson*, 244 U.S. 205. The Court held that, under Article III, Section 2, of the Constitution, in the absence of some controlling federal statute, "the general maritime law as accepted by the federal courts constitutes part of our national law applicable to matters within the admiralty and maritime jurisdiction." 244 U.S. at 214–215. In other words, in the absence of federal legislation, federal maritime law was held to occupy the area within admiralty jurisdiction. While saying that "it would be difficult, if not impossible, to define with exactness

just how far the general maritime law may be changed, modified, or affected by state legislation" (*id.* at 216), the Court ruled that to permit the application of the state workmen's compensation act to the injury, which was clearly within admiralty jurisdiction, would be to destroy "the very uniformity in respect to maritime matters which the Constitution was designed to establish." *Id.* at 217. The Court therefore held that application of the New York act was unconstitutional. In opinions by Mr. Justice Holmes and Mr. Justice Pitney, four members of the Court dissented.

Later that year, Congress amended the statutory grant of admiralty jurisdiction to district courts by "saving to suitors" their rights and remedies under the workmen's compensation act of any State. Act of October 6, 1917, 40 Stat. 395. This Act was intended to confer concurrent jurisdiction on the workmen's compensation boards and the federal courts for injuries within admiralty jurisdiction, so that the injured workman or his survivors could elect either to bring a traditional action in admiralty in the federal court for the injury or to submit a claim under the state compensation act. S. Rept. No. 135, 65th Cong., 1st Sess. In 1920, however, this Court held that the Act of October 6, 1917, would destroy the harmony and uniformity which was the purpose of the constitutional grant of maritime jurisdiction, and that it was therefore an unconstitutional delegation to the state legislatures of Congressional authority. *Knickerbocker Ice Co.* v. *Stewart*, 253 U.S. 149. Mr. Justice Holmes dissented in an opinion joined by three other members of the Court. At the time

of this decision, all but eight of the States had adopted workmen's compensation acts, 1 Larson, *The Law of Workmen's Compensation*, § 5.30, p. 39.

Perhaps in heed of the criticisms of the decisions in *Jensen* and *Knickerbocker Ice Co.* by the dissenting members of the Court and the commentators, the Court in its 1921 Term lessened the impact of those two cases by announcing the "local concern" or "maritime but local" doctrine, and applying state law to an injury within admiralty jurisdiction in two situations. *Western Fuel Co.* v. *Garcia*, 257 U.S. 233; *Grant Smith-Porter Ship Co.* v. *Rohde*, 257 U.S. 469. In *Western Fuel Co.* v. *Garcia*, the Court held that a state wrongful death statute could be applied to an injury to a stevedore received while he was unloading the cargo of a vessel, because "[t]he subject is maritime [but] local in character" and the modification of the law "will not work material prejudice to the characteristic features of the general maritime law, nor interfere with the proper harmony and uniformity of that law." 257 U.S. at 242. The Court upheld the application of state law to the injury occurring within admiralty jurisdiction despite the virtual identity of the facts in *Garcia* to the activity and the nature of employment involved in *Jensen*.

In *Grant Smith-Porter Smith Co.* v. *Rohde*, the Court upheld the application of the Oregon workmen's compensation act, under the "local concern" doctrine, to another injury within admiralty jurisdiction. In that case a carpenter, who had been hired by a company which built new ships, was in-

jured while engaged in making a bulkhead aboard a vessel which had been launched but not completed. He was not hired to engage in repair work, and apparently his employer only built new ships and did not repair completed ones. On certification from the Court of Appeals for the Ninth Circuit, the Court reaffirmed the established principle that admiralty jurisdiction in tort depended upon the locus of the injury and held that the injury was within admiralty jurisdiction. 257 U.S. at 476, 477–478. The Court nevertheless held that, since the employee's contract with the employer was non-maritime (see *Thames Towboat Co.* v. *The Schooner "Francis McDonald,"* 254 U.S. 242), and "neither Rohde's general employment nor his activities at the time had any direct relation to navigation or commerce" (257 U.S. at 475–476), the matter was "local" in nature. Therefore, state compensation laws could apply under the "local concern" doctrine announced in *Western Fuel Co.* v. *Garcia, supra.*[*]

In a third case decided during the same Term, the Court held that a state workmen's compensation act could validly be applied to an injury to a stevedore engaged in unloading the cargo of a vessel, since the injury had occurred on a dock which was "an extension of the land." *Industrial Commission* v. *Nordenholt Corp.*, 259 U.S. 263, 275. The activity, employment, and maritime nature of the contract were virtually identical to those in *Jensen*. The locus of the injury was the distinguishing feature: the injury occurred on the dock, rather than on the ship. Unlike *Garcia* and *Rohde*, the decision did not rest upon the

[*] We discuss the *Rohde* case in more detail, *infra*, pp. 74–76

newly evolved "local concern" doctrine but was based upon the then prevailing view of the line of demarcation between admiralty and local law which placed injuries occurring upon a dock (which was upon navigable waters) beyond admiralty jurisdiction and within the exclusive jurisdiction of state law. *Cleveland Terminal Valley R.R. Co.* v. *Cleveland S.S. Co.*, 208 U.S. 316. But see Act of June 19, 1948, 62 Stat. 496, 46 U.S.C. 740. Since maritime law did not apply, there was no conflict between it and local law, and the latter governed. 259 U.S. at 275–276.

Apparently encouraged by these decisions, Congress in the same year again adopted legislation which would have permitted the application of state workmen's compensation laws to injuries upon navigable waters to persons in maritime employment. Act of June 10, 1922, 42 Stat. 634. The new statute was similar in form and substance to the 1917 act, except that it excluded from coverage the most maritime category of employees, seamen and masters. The Court found the difference between the two acts insufficient to warrant a different result, adhered to its decisions in *Jensen* and *Knickerbocker Ice* v. *Stewart, supra,* and held that the 1922 Act was unconstitutional. *Washington* v. *Dawson,* 264 U.S. 219. The Court suggested, however, that Congress had the constitutional authority to adopt a uniform federal compensation act. *Id.* at 227–228.

The Court meanwhile applied state wrongful death statutes in cases involving injuries sustained by workers who were hired for, and were engaged in, repair work on completed vessels even though the employees were working under maritime contracts and

the introduction of S. 3170. The provisions of the bill were based upon the New York Workmen's Compensation Act. Hearings on S. 3170, Senate Judiciary Committee, 69th Cong., 1st Sess. [hereafter Senate Hearings], pp. 31–32. As originally drafted, the bill was apparently designed to provide coverage only for injuries within the admiralty jurisdiction which were not compensable under state workmen's compensation acts either applying of their own force or by supplementation of maritime law under the "local concern" doctrine. Section 3 of the bill as originally drafted read (Senate Hearings, p. 2):

> This act shall apply to any employment performed on a place within the admiralty jurisdiction of the United States, *except employment of local concern and of no direct relation to navigation and commerce;* but shall not apply to employment as master or member of the crew of a vessel. [Emphasis added.]

Even as drafted, however, the statute was intended to apply to "carpenters, to boiler makers, to electricians, to sheet-metal workers, and all mechanics who are employed in connection with repairing a ship * * *." *Id.* at p. 21.

At the Senate hearings, representatives of the International Longshoremen's Union and of unions representing other trades testified generally in support of the bill, noting that all but six of the States had workmen's compensation laws. Senate Hearings, pp. 18–44, 37. They explained the need for the bill as a result of the *Jensen*, *Knickerbocker Ice*, and *Dawson* decisions, and quoted from the latter opinion to

demonstrate that Congress had the authority under the Constitution to adopt the bill. *Id.* at p. 18. An attorney for the unions also explained that the locus of the injury was the sole test for admiralty jurisdiction and that employees working on docks were solely within the jurisdiction of the State, which could validly provide compensation for them by state law. *Id.* at pp. 30–31. On the other hand, unions representing seamen, apparently being satisfied with their remedies under the Jones Act, wished to be exempted from the provisions of the new bill. *Id.* at p. 17.

Representatives of the shipbuilding, ship repair firms, ship lines, and other employers testified in favor of the principles of the bill, but opposed some of its features. Senate Hearings, pp. 45–91. The employers were generally in favor of broad coverage for the new bill.

When the Chairman of the Judiciary Committee, Senator Cummins, questioned the meaning and scope of the exemption for "employment of local concern" and of no direct relation to navigation and commerce in Section 3, O. G. Brown, an attorney representing the Council of American Shipbuilders, stated that the exception was there because of the *Rohde* decision (allowing state workmen's compensation legislation to apply to injuries within maritime jurisdiction when the subject was of local concern (see *supra*, pp. 27–28)). He noted the parallel between the language in the bill and that in the decision. *Id.* at p. 57.

Dudley M. Holman, General Manager of the United States Mutual Liability Insurance Co., testifying on

behalf of American Shipbuilders (Inc.) and the New York and New Jersey Dry Dock Association (an association of shipyards engaged in the construction and repair of vessels), attacked Section 3 of the bill as drafted. He noted that it was difficult to determine who was covered, and Senator Cummins agreed. Senate Hearings, p. 91. Holman said that under Section 3 craftsmen of a shipyard if injured aboard a vessel which had been launched but not completed in Massachusetts would be entitled only to compensation under the state act at the rate of $16 a week, whereas if they were injured aboard a completed vessel, they would receive $25 a week. This result, he stated, was difficult to understand or justify. *Id.* at pp, 91–93.

At the close of the hearing, a formal written statement was submitted by the American Shipbuilders (Inc.) and the New York and New Jersey Dry Dock Association and was received by the Committee. Senate Hearings, pp. 95–104. After setting forth Section 3 of the bill as originally drafted, the organization noted the following objections (*id.* at p. 95):

> This provision is indefinite. The exception of 'employment of local concern and of no direct relation to navigation and commerce' is vague and will be the subject of continual litigation. Innumerable claims will become legal questions requiring determination by the courts.
>
> Instead of excepting seamen, *it should include all maritime employment under the admiralty jurisdiction* of the United States court. The burden of such legislation may then be

> properly distributed over the maritime industry. [Emphasis added.]

Failure to include "all maritime employment under the admiralty jurisdiction" would, it was suggested, breed expensive and time-consuming litigation. *Id.* at pp. 95–96.

The bill as recommended by the Senate Judiciary Committee consisted of a redraft of the original measure. S. Rept. No. 973, 69th Cong., 1st Sess., p. 1. The coverage provision, Section 3, had been entirely rewritten, apparently with a view toward meeting some of the objections made to the original bill at the hearings. As rewritten, it read in pertinent part as follows (*id.* at p. 2):

> SEC. 3. (a) Compensation shall be payable under this act in respect of disability or death of an employee, but only if the disability or death results from an injury occurring upon the navigable waters of the United States (including any dry dock)[10] or occurring while such employee was employed on board a vessel of the United States upon the high seas, and *if recovery for the disability or death through workmen's compensation proceedings may not validly be provided by State law.* No compensation shall be payable in respect to the disability or death of—

[10] Dry docks, which Section 3(a) of the Act specifically states are within the coverage of the Act, generally float on the water and are used for repair or construction of vessels. Docks, like wharves, however, do not float on the water and are used for loading and unloading vessels. Docks may be viewed either as part of navigable waters and within admiralty jurisdiction (Act of June 19, 1948, 62 Stat. 496, 46 U.S.C. 740) or as extensions of land.

> (1) A master or seamen, as defined in section 4612 of the Revised Statutes, as amended * * *. [Emphasis added.]
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> * * * * *

Thus, the Senate committee deleted the exception for "employment of local concern and of no direct relation to navigation and commerce" (*supra*, p. 32) in the bill as originally drafted and substituted the language italicized above which does not refer to the "local concern" doctrine. Although the representatives of the shipyards had not succeeded in securing coverage for all maritime employment, since seamen were excluded, the specific "local concern" exemption had been removed. The exemption was apparently removed because of the urging of the shipyards for broader coverage for their employees, and because of their attack upon the anomaly of providing only state coverage for injury upon uncompleted vessels floating upon navigable waters, while providing federal coverage for similar injuries upon completed vessels being repaired.

The Committee's explanation of the bill was brief and general. S. Rept. No. 973, 69th Cong., 1st Sess., pp. 16–17. This Court's decisions in *Jensen*, *Knickerbocker Ice*, and *Dawson* were specifically said to be the occasion for the legislation. *Id.* at p. 16. There was no citation or even allusion to the *Rohde* or other "local concern" cases. The purpose and coverage of the bill were explained as follows (*ibid.*):

> * * * * *
>
> The purpose of this bill is to provide for compensation, in the stead of liability, for a

> class of employees commonly known as "longshoremen." These men are mainly employed in loading, unloading, refitting, and repairing ships; but it should be remarked that *injuries occurring in loading or unloading are not covered unless they occur on the ship or between the wharf and the ship so as to bring them within the maritime jurisdiction of the United States.*
>
> * * * * *
>
> It thus appears that there is no way of giving to these hard-working men, engaged in a somewhat hazardous employment, the justice involved in the modern principle of compensation without enacting a uniform compensation statute.
>
> * * * * *
>
> Section (3) of the bill describes the persons to be brought within its terms with such exceptions as are necessary to limit the operation of the bill to the very persons who are intended to be covered by it. [Emphasis added.]

From the statement that injuries are not covered "unless they occur on the ship or between the wharf and the ship so as to bring them within the maritime jurisdiction of the United States," it seems to us to follow that if injuries do occur within admiralty jurisdiction they are covered. Taking this Senate report together with the changes made in the bill and the comments at the hearings, we believe that Section 3, the coverage provision, was designed to include under the Act all injuries (to employees of employers subject to the Act) occurring upon navigable waters and

"within the maritime jurisdiction of the United States," and to exclude from coverage only injuries in maritime employment occurring outside that jurisdiction, such as those on extensions of land. The bill as reported was the subject of little discussion and no controversy on the floor of the Senate, which gave its quick approval. 67 Cong. Rec. 10608, 10614.

b. The House Hearings and Passage.—The Judiciary Committee of the House had previously held hearings and reported favorably on a bill providing for more liberal compensation benefits than the bill which the Senate adopted. H. Rept. No. 1190, 69th Cong., 1st Sess. (accompanying H.R. 12063). The Chairman of the Judiciary Committee, Representative Graham, had been unable to obtain clearance for the House bill from the House Rules Committee, however, and therefore decided to hold new hearings on the Senate bill. Hearings before the House Judiciary Committee on S. 3170, 69th Cong., 1st Sess., Serial 16, Part 2 [hereinafter House Hearings].

The hearings before the House Committee were similar in many ways to those before the Senate. The representatives of the unions stated that they were willing to accept the less generous features of the Senate bill in order to obtain enactment of a bill. House Hearings, pp. 139–140. The representative of the shipyards took exception to the exclusion of seamen, but agreed to accept the bill if the seamen were included within its coverage. *Id.* at pp. 141, 144–146. A witness testifying on behalf of the insurance underwriters requested reinsertion of the exemption for "employment of local concern" into Section 3, which

the Senate Committee had removed (see *supra*, pp. 31–35). *Id.* at p. 180.

The House Committee, in redrafting the Senate bill, rewrote Section 3 as follows (H. Rept. No. 1767, 69th Cong., 2d Sess., p. 2):

> SEC. 3. This act shall apply to any maritime employment performed—
>
> (a) Upon the navigable waters of the United States, including any dry dock; or
>
> (b) As master or member of a crew of a barge, lighter, tug, dredge, vessel, or other ocean, lake, river, canal, harbor, or floating craft owned by a citizen of the United States.
>
> * * * * *

Only seamen of foreign vessels, personnel of the Army, Navy, and Coast Guard, and employees of states were excluded from coverage. *Ibid.* Because of the deletion of the provision in the Senate bill limiting coverage to injuries where workmen's compensation "may not validly be provided by state law," the bill as reported would apparently have covered injuries occurring during maritime employment on extensions of land on navigible waters which have traditionally been beyond maritime jurisdiction and within the jurisdiction of the States.

The explanation of the bill by the House committee was, like its Senate counterpart, brief and general. H. Rept. No. 1767, 69th Cong., 2d Sess., pp. 19–20. The purposes of the bill were summarized in the following manner (*id.* at p. 20):

> *The bill as amended, therefore, will enable Congress to discharge its obligation to the maritime workers placed under their jurisdiction by the*

> *Constitution of the United States* by providing for them a law whereby they may receive the benefits of workmen's compensation and thus afford them the same remedies that have been provided by legislation for those killed or injured in the court of their employment in nearly every State in the Union. [Emphasis added.]

The effect of the coverage provision was described as (*id.* at p. 19):

> The Senate bill as reported by the committee will provide the benefits of workmen's compensation to *practically all maritime workers within the admiralty jurisdiction.* [Emphasis added.]

The report noted that seamen had been included within the coverage of the bill (*id.* at p. 20).

Representative Graham again found it difficult to clear the bill through the House Rules Committee. In order to obtain a rule from that Committee, Representative Graham, with the consent of the members of his Committee, agreed to amend the bill so as to exclude seamen from coverage. 68 Cong. Rec. 5410, 5412. In so doing, the Judiciary Committee adopted the basic structure of the coverage provisions (Section 3) of the bill as it had passed the Senate, including the limitation to injuries where workmen's compensation "may not validly be provided by state law." *Id.* at 5403–5404. In explaining the amendment on the floor of the House, Representative Graham referred to its effect as merely excluding seamen from coverage (*id.* at 5410–5411), as did another pro-

ponent of the bill who had studied it as a member of the Rules Committee (*id.* at 5412).

There was no suggestion by anyone in the debates that any category of workers within admiralty jurisdiction would be excluded from coverage, except seamen and masters. 68 Cong. Rec. 5410–5414. Indeed, when the bill was read to the House, the only part of Section 3 which was quoted was the opening statement that "Compensation shall be payable under this act in respect of disability or death of an employee, but only if the disability or death results from an injury occurring upon the navigable waters of the United States (including any dry dock)." *Id.* at 5414. Proponents of the bill supported it on the grounds that "social justice is the keynote of this legislation" and that forty-three States had adopted workmen's compensation acts. *Id.* at 5412, 5413. The opponents of the bill pointed to the presumptions created by Section 20 of the bill, including the presumption of coverage, and objected to its "far-reaching" impact. *Id.* at 5411. None the less, the bill passed the House by a vote of 265 to 7.

c. Senate Passage of the House Bill.—The bill as amended by the House was then laid before the Senate. 68 Cong. Rec. 5900–5908. The floor manager explained that the principal dispute under the bill was over the exclusion of seamen, and noted that seamen, under the bill as amended, were excluded as they wished to be. *Id.* at 5908. Upon this assurance that seamen were excluded, the bill was accepted without opposition. *Id.* at 5908–5909.

d. Summary of the Legislative History.—The legislative history we have just detailed reveals that the original draft of the bill which became the Longshoremen's Act (see *supra*, p. 32) would have provided for the same result as that reached by the court of appeals in this case—that is, it would have specifically excluded from coverage injuries within admiralty jurisdiction which under the *Rohde* decision and the "local concern" doctrine were compensable under state workmen's compensation acts by supplementation of maritime law. However, that provision was rewritten by the Senate Judiciary Committee—in apparent response to objections by employers and insurers that the coverage provision was too vague, was not inclusive enough, and would result in various anomalies, such as that the same craftsmen would receive different compensation for the same injuries on navigable water, depending upon whether the vessel was under construction or repair. The rewritten provision contained the clause, which was finally adopted, limiting coverage to injuries where workmen's compensation "may not validly be provided by State law." This clause was apparently designed, as the change in the statutory language seems to suggest, to exclude only injuries occurring upon extensions of land which were not then regarded as "within the maritime jurisdiction of the United States." S. Rept. No. 973, 69th Cong., 1st Sess., p. 16.

The House committee modified the provision somewhat, intending to include virtually all injuries to amphibious workers within maritime jurisdiction, including those to seamen. H. Rept. No. 1767, 69th

Cong., 2d Sess., p. 19. Because of objections from seamen and members of the House Rules Committee, however, seamen were excluded, and the coverage provision was amended to its present form. But the debates indicate that the amendment was intended to exclude any category of injuries except those to seamen. 68 Cong. Rec. 5410–5414, 5908–5909.

In short, the legislative history reveals the intent of Congress to provide coverage under the Longshoremen's Act for all injuries to employees within the maritime jurisdiction of the United States (including those within the "local concern" doctrine) and to exclude from coverage only those injuries in maritime employment on land or extensions of land where state workmen's compensation applies "by State law" in and of itself.

Although it may appear a little strange today that Congress sought to exclude from the Act's coverage injuries in maritime employment occurring upon extensions of land, the exclusion is easily understandable in light of the problems confronting the draftsmen at the time. The exclusion of such injuries from the maritime jurisdiction of the United States had been settled by authoritative decisions of this Court. *Industrial Commission* v. *Nordenholt Corp.*, 259 U.S. 263 (see *supra*, pp. 28–29); *Cleveland Terminal Valley R.R. Co.* v. *Cleveland S.S. Co.*, 208 U.S. 316. As the House report explained, the Longshoremen's Act was designed to enable "Congress to discharge its obligation to the maritime workers placed under their jurisdiction by the Constitution." H. Rept. No. 1767, 69th Cong., 2d Sess., p. 20. The

Senate report also explained that the Act was limited to injuries "within the maritime jurisdiction of the United States." S. Rept. No. 973, 69th Cong., 1st Sess., p. 16. Thus, in determining the coverage of the Act, Congress accepted the then recognized line of demarcation between federal maritime and state authority.[11] The invalidation by this Court of two prior statutes enacted by Congress to permit state workmen's compensation for workers injured within the maritime jurisdiction made the draftsmen careful to avoid any possible constitutional pitfalls.[12]

The Court of Appeals for the Fifth Circuit based its decision below on the ground that Congress had intended to exclude from coverage injuries within admiralty jurisdiction which, prior to 1927, were compensable under state workmen's compensation laws by their supplementation of admiralty law under the "local concern" doctrine (as exemplified in the *Rohde* case), as well as injuries on extensions of land which were within the State's own jurisdiction and therefore were compensable under state workmen's compensation laws by their own force. While Section

[11] Section 3(a) did provide that injuries occurring on dry docks and marine railways were within the coverage of the Act. See *Avondale Marine Ways* v. *Henderson*, 346 U.S. 366, affirming 201 F. 2d 437 (C.A. 5) (see *infra*, pp. 55-56). Dry docks, however, float on water, and marine railways are apparently regarded merely as extensions of dry docks.

[12] Subsequently, it has become clear that Congress has the power to extend maritime jurisdiction. *O'Donnell* v. *Great Lakes Dredge & Dock Co.*, 318 U.S. 36; see also *United States* v. *Matson Navigation Co.*, 201 F. 2d 610 (C.A. 9). At that time, however, the possible constitutional objections to the Longshoremen's Act were not considered frivolous. See *Crowell* v. *Benson*, 285 U.S. 22.

3(a) on its face is susceptible to such a construction, we think the legislative history reveals that Congress intended to accept the then recognized line of demarcation between state and federal maritime jurisdiction, and exclude only those injuries to which "State law" in itself would apply because they were beyond maritime jurisdiction. Indeed, prior to the decisions in these cases, the Fifth Circuit itself had, on the basis of the background and legislative history of the Longshoremen's Act, reached the same conclusion that we have set forth—namely that Congress had intended the Act to cover injuries on navigable waters which, although within the "local concern" doctrine, were also within admiralty jurisdiction, and to exclude only those injuries which were within the exclusive jurisdiction of the States. *Continental Casualty Co.* v. *Lawson*, 64 F. 2d 802, 805, *De Bardeleben Coal Co.* v. *Henderson*, 142 F. 2d 481, 483.[13] Accord, *Travelers Ins. Co.* v. *McManigal*, 139 F. 2d 949, 951 (C.A. 4); *Western Boat Building Co.* v. *O'Leary*, 198 F. 2d 409, 414 (C.A. 9). See our discussion of these cases *infra*, pp. 65–69.

3. Under the Controlling Decisions of this Court, the Longshoremen's Act Applies to All Injuries Occurring at Places within Admiralty Jurisdiction Whether the Injury Would Also Be Compensable under a State Workmen's Compensation Act by Virtue of the "Local Concern" Doctrine.

Since the passage of the Longshoremen's Act in 1927, this Court has on numerous occasions discussed or decided the scope of coverage of the federal and

[13] The court of appeals below expressly recognized the conflict between the construction of the Act adopted in the cases at bar, and that followed by it previously (R. 51–52).

state workmen's compensation acts. These cases, we submit, are controlling here, and require that the awards under the Act be sustained. Considered together, they stand for the proposition that all injuries within the recognized tort jurisdiction of admiralty are compensable under the federal legislation.

a. The Decisions of This Court.—In *Parker* v. *Motor Boat Sales Co.*, 314 U.S. 244, an employee, who had been "hired primarily as a janitor and porter" (*id.* at 247) and whose duties were mostly on shore, was drowned when the boat in which he was riding capsized on the James River near Richmond, Virginia. He had been riding in the boat to keep a lookout for hidden objects in the water, in furtherance of his employer's business. The Deputy Commissioner made an award to his widow of compensation under the Longshoremen's Act. The court of appeals, however, held the award invalid on the grounds, *inter alia*, that coverage under Section 3(a) (33 U.S.C. 903(a)) was excluded because the deceased's employment was "local" in nature and therefore compensation under the state workmen's compensation act could validly have been provided under the "local concern" doctrine. The court of appeals relied upon *Alaska Packers Ass'n* v. *Industrial Accident Commission*, 276 U.S. 467, which involved a fisherman, who also had duties in connection with canning fish ashore and was injured while attempting to push his boat into the water in preparation for storing it after the fishing season had ended. The Court held that the fisherman was engaged in activities which were not directly related to navigation and were "local in character" so that the

state workmen's compensation act could validly apply under the "local concern" doctrine. *Id.* at 469.

This Court reversed the court of appeals in the *Parker* case unanimously. The Court found that the locus of the accident on navigable water and the maritime activity in which the employee was engaged at that time brought the employee within the area of Congressional power to legislate. The Court stated that, if the decision of the court of appeals was to be sustained, it must be on the ground that the employment was "subject to state regulation until Congress has exercised its paramount power" and that by Section 3(a) of the Act "Congress kept out of the area in which recovery * * * may * * * validly be provided by State law * * *." 314 U.S. at 247–248. The Court refused, however, to accept a literal reading of Section 3(a), since such a reading would call for reevaluation of the *Jensen, Knickerbocker Ice,* and *Dawson* cases (see *supra,* pp. 25–26, 29), which held that federal jurisdiction was exclusive within the jurisdiction of admiralty law even in the absence of action by Congress. For, if those cases were wrong, a State could validly provide compensation for any injury upon navigable water within its boundaries and a literal reading of Section 3(a) would mean that the Longshoremen's Act would almost never be applicable. Instead, the Court stated that there was no need to reexamine the *Jensen* line of cases because (314 U.S. at 249–250):

> There can be no doubt that the purpose of the Act was to provide for federal compensation in the area which the specific decisions referred

> to placed beyond the reach of the states. The proviso permitting recovery only where compensation "may not validly be provided by State law" cannot be read in a manner that would defeat this purpose. An interpretation which would enlarge or contract the effect of the proviso in accordance with whether this Court rejected or reaffirmed the constitutional basis of the *Jensen* and its companion cases cannot be acceptable. The result of such an interpretation would be to subject the scope of protection that Congress wished to provide, to uncertainties that Congress wished to avoid.
>
> The main impetus for the Longshoremen's and Harbor Workers' Compensation Act was the need to correct a gap made plain by decisions of this Court. We believe that there is only one interpretation of the proviso in § 3(a) which would accord with the aim of Congress: the field in which a state may not validly provide for compensation must be taken, for the purposes of the Act, as the same field which the *Jensen* line of decision excluded from state compensation laws. Without affirming or rejecting the *constitutional* implications of those cases, we accept them as the measure by which Congress intended to mark the scope of the Act they brought into existence. [Emphasis in original.]

The Court had no occasion to, and did not, consider the precise scope of Section 3(a), for it found that the injury was within the area of federal jurisdiction under *Jensen*. Thus, the opinion did not discuss the question whether Section 3(a) was intended to exclude injuries within the admiralty jurisdiction but also

within the "local concern" doctrine.[14] However, the Court allowed a claim under the Longshoremen's Act in a situation which would appear to be covered by the "local concern" doctrine since the facts—a janitor aboard a motorboat, keeping a lookout for hidden objects—were extremely close to those in *Alaska Packers Ass'n* v. *Industrial Accident Commission*—a fisherman attempting to push his boat into the water (see *supra*, p. 46)—and other "local concern" cases upholding the application of state workmen's compensation laws. We believe, therefore, that the Court in effect held in *Parker* that Section 3(a) incorporates the line drawn in the *Jensen* case between admiralty and state jurisdiction but without an exception for matters of "local concern." This is the interpretation which has been made by the lower courts and the commentators, who have generally construed *Parker* as heralding a narrow construction of the proviso of Section 3(a) and a correspondingly broad construction of the coverage of the Act. *E.g., Travelers Ins. Co.* v. *McManigal*, 139 F. 2d 949, 951 (C.A. 4); *Western Boat Building Co.* v. *O'Leary*, 198 F. 2d 409, 414 (C.A. 9); *De Bardeleben Coal Corp.* v. *Henderson*, 142 F. 2d 481, 484 (C.A. 5); Gilmore & Black, *Admiralty*, § 6–49, p. 347.

Shortly after the decision in *Parker*, this Court, in *Davis* v. *Department of Labor*, 317 U.S. 249, which has properly been regarded as a landmark case, stated the general principles which govern the relationship between state and federal compensation acts

[14] Counsel for the Deputy Commissioner in *Parker* did not urge that the Act covered such injuries. Brief for Petitioner in No. 46, Oct. Term 1941.

in the area of maritime injuries to amphibious workers. In that case the Court upheld an award under a state workmen's compensation act to an employee who was injured while standing on a barge on a navigable river, dismantling a drawbridge which was an obstruction to navigation. The Court recognized that the amphibious worker faced a jurisdictional dilemma in trying to determine whether to seek state or federal compensation for his injuries since the application of the "local concern" doctrine depended upon the "surrounding circumstances" of each case. *Id.* at 253. As a result, a "twilight zone" had been created where the proper remedy was "extremely difficult" to determine. *Id.* at 253, 256. The Court said that, if the worker were forced to choose between the state act and the Longshoremen's Act, he would have to determine with certainty a "question over which courts regularly divide among themselves and within their own membership," at the risk not only of the serious financial loss and delay of litigation, but also of being barred by the statute of limitations in the proper forum while he was erroneously pursuing his claim elsewhere. *Id.* at 254. And this dilemma would conflict with the very purpose of workmen's compensation (*id.* at 254):

> Such a result defeats the purpose of the federal act, which seeks to give "to these hardworking men, engaged in a somewhat hazardous employment, the justice involved in the modern principle of compensation" * * *.

In order to resolve the dilemma posed for the employee by injuries occurring within the "twilight zone," the Court relied on two presumptions: the pre-

sumption of the constitutionality of the state workmen's compensation law, on the one hand, and the statutory presumption of coverage (Section 20(a), 33 U.S.C. 920(a), *supra*, p. 4) under the Longshoremen's Act, on the other. Where the injured employee sought recovery under the state act, the presumption of constitutionality would sustain an award. 317 U.S. at 257. Similarly, the statutory presumption in the Longshoremen's Act could sustain an award in the very same circumstances (317 U.S. at 256–257):

> Where there has been a hearing by the federal administrative agency entrusted with broad powers of investigation, fact finding, determination, and award, our task proves easy. There, we are aided by the provision of the federal act, 33 U.S.C. § 920, which provides that, in proceedings under that act, jurisdiction is to be "presumed, in the absence of substantial evidence to the contrary." Fact findings of the agency, where supported by the evidence, are made final. Their conclusion that a case falls within the federal jurisdiction is therefore entitled to great weight and will be rejected only in cases of apparent error. It was under these circumstances that we sustained the Commissioner's findings in *Parker* v. *Motor Boat Sales, supra.*

The two presumptions in effect gave the employee injured in the twilight zone an election to proceed under either federal or state law. Mr. Justice Frankfurter, in a concurring opinion in *Davis*, stated that "the practical result" of the Court's holdings was that "the employee in a situation like the present is permitted to recover either under the federal act

[citing, *inter alia*, *Parker* v. *Motor Boat Sales Co.*] * * * or under a state statute [citing, *inter alia*, *Alaska Packers Ass'n* v. *Industrial Accident Commission*] * * *." 317 U.S. at 259. Chief Justice Stone, dissenting, similarly recognized that the Court had enunciated the doctrine "that recovery under either the state or the federal act is to be sustained if the case is thought a close one"; he criticized the "proposition that an employee in a 'twilight zone' (where it is doubtful whether the federal or a state act applies) can recover under either act * * *." *Id.* at 261, 262. And the Court has recently said concerning the *Davis* decision (*Hahn* v. *Ross Island Sand & Gravel Co.*, 358 U.S. 272, 273):

> As to cases within this "twilight zone," *Davis* in effect gave an injured waterfront employee an election to recover compensation under either the Longshoremen's Act or the Workmen's Compensation Law of the State within which the injury occurred.

Although *Davis* resolved the employee's jurisdictional dilemma, and provided clear guidelines for decisions concerning injuries within the "twilight zone," the Court's opinion in that case did not define the limits of that zone of possibly overlapping remedies. Within the next few years, however, the scope of that zone was indicated by later decisions of the Court.

As we have noted (*supra*, pp. 30–31), prior to the adoption of the Longshoremen's Act in 1927, the Court had made clear that where injuries on navigable waters arose out of repair work on a completed vessel, state workmen's compensation acts could not validly apply under the "local concern" doctrine. *Great Lakes Dredge & Dock Co.* v. *Kierejewski*, 261 U.S. 479;

Gonsalves v. *Morse Dry Dock & Repair Co.*, 266 U.S. 171; *Robins Dry Dock & Repair Co.* v. *Dahl*, 266 U.S. 449; accord, *Messel* v. *Foundation Co.*, 274 U.S. 427; *Baizley Iron Works* v. *Spun*, 281 U.S. 222. After this Court's decision in *Davis*, employers argued that injuries occurring on navigable waters arising out of the repair of completed vessels were not within the "twilight zone" where state as well as federal workmen's compensation acts applied, because the pre-1927 precedents clearly showed that they were within the exclusive domain of federal law. And a California court adopted their argument. *Baskin* v. *Industrial Accident Commission*, 89 Cal. App. 2d 632, 201 P. 2d 549.

The Supreme Judicial Court of Massachusetts, however, took a different view in *Moore's* case, 323 Mass. 162, 80 N.E. 2d 478. The employee in that case was injured while engaged in the repair of a completed vessel which was in a dry dock floating on the navigable waters of Boston harbor. He sought compensation under the state workmen's compensation act. Under the pre-1927 decisions of this Court and of the Massachusetts court,[15] federal maritime jurisdiction was exclusive because the work had a direct relation to navigation and the injury occurred upon navigable waters, so that the "local concern" doctrine would not have supported an award under the state workmen's compensation act. Accordingly, if the pre-1927 precedents were controlling, and the "twilight zone" did not extend to injuries clearly within such precedents, then the claim under the state compensation

[15] *O'Hara's Case*, 248 Mass. 31, 142 N.E. 844 (1924); *Ahern's Case*, 247 Mass. 512, 142 N.E. 703 (1923).

act would have to be dismissed. 323 Mass. at 166. The Supreme Judicial Court held, however, that the reason for the *Davis* decision would be defeated if the "twilight zone" were so limited (*id.* at 167):

> * * * [T]he most important question has now become the fixing of the boundaries of the new "twilight zone," and for this the case gives us no rule or test other than the indefinable and subjective test of doubt. Mr. Justice Frankfurter says that "Theoretic illogic is inevitable so long as the employee * * * is permitted to recover" at his choice under either act. 317 U.S. at page 259. Probably therefore our proper course is not to attempt to reason the matter through and to reconcile previous authorities, or to preserve fine lines of distinction, but rather simply to recognize the futility of attempting to reason logically about "illogic," and to treat the *Davis* case as intended to be a revolutionary decision deemed necessary to escape an intolerable situation and as designed to include within a wide circle of doubt all water front cases involving aspects pertaining both to the land and to the sea where a reasonable argument can be made either way, even though a careful examination of numerous previous decisions might disclose an apparent weight of authority one way or the other. We can see no other manner in which the *Davis* case can be given the effect that we must suppose the court intended it should have, and we must assume that the court intends to follow that case in the future.

Therefore, the court held that the "twilight zone" included cases which, prior to 1927, might have been found to be within exclusive federal maritime juris-

diction, and determined that in such cases the employee's election of state workmen's compensation should be sustained under the presumption of constitutionality.

This Court affirmed the Massachusetts decision without opinion on the basis of its decision in *Davis. Bethlehem Steel Co.* v. *Moores,* 335 U.S. 874. The judgment in the California case was vacated and the case remanded for consideration in the light of the *Moores* and *Davis* cases. *Baskin* v. *Industrial Accident Commission,* 338 U.S. 854. On remand from this Court's decision, the California court ordered the State Industrial Accident Commission to take jurisdiction under the state compensation law (97 Cal. App. 2d 257, 217 P. 2d 733) and this Court affirmed that order in a *per curiam* opinion which merely cited the *Moores, Davis,* and earlier *Baskin* cases. *Kaiser Co.* v. *Baskin,* 340 U.S. 886. These cases clearly hold that the "twilight zone" has a very broad scope, and that state workmen's compensation laws can be applicable to an injury even though it occurred, under both the pre- and post-1927 precedents, within the area of exclusive federal jurisdiction.

A more recent decision of this Court applied the principles announced in *Davis* to an action brought under the Longshoremen's Act. *Avondale Marine Ways* v. *Henderson,* 346 U.S. 366. In that case an employee was killed while engaged in the repair of a barge which was on a marine railway [16] on land, approximately 400 feet from navigable waters. The

[16] A marine railway consists of rails which extend from the land into the water, and a carriage on rollers which carries

employer[17] contended that this Court held in *Industrial Commission* v. *Nordenholt Corp.*, 259 U.S. 263 (see *supra*, pp. 28–29), that state compensation acts applied to injuries occurring on land. Therefore, it claimed, even if a marine railway was considered as a drydock, which Section 3(a) specifically includes within its definition of navigable waters, the Longshoremen's Act could not apply since the Act covers only injuries not provided for "by State law." Brief for Petitioner in No. 44, Oct. Term, 1953, pp. 7–25. After full briefing and oral argument, this Court rejected the employer's contention and affirmed the award of Longshoremen's Act compensation in a *per curiam* opinion citing *Davis*, *Baskin* v. *Industrial Accident Commission*, and *Moores*, *supra*.

The *Avondale Marine Ways* case is almost the converse of *Baskin* and *Moores*. In those cases, the Court held that an injury within the area of exclusive federal jurisdiction under the earlier cases (and therefore clearly within the coverage of the Longshoremen's Act) was also compensable under state workmen's compensation laws. In *Avondale Marine Ways*, the Court held that an injury within traditional state jurisdiction (*Industrial Commission* v. *Nordenholt Corp.*, *supra*), and therefore covered by state workmen's compensation laws under state law in and

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the vessel from the water to the land, so that its hull can be repaired. In the usage of the ship building and repair industry, a marine railway is a dry dock, as are graven and floating dry docks which are used to repair vessels. *Maryland Casualty Co.* v. *Lawson*, 101 F. 2d 732, 733 (C.A. 5).

[17] Avondale Marine Ways, Inc. was the predecessor corporation to Avondale Shipyards, Inc., one of the employers in the present case.

of itself (not under the "local concern" doctrine), was still within the "twlight zone" and thus was covered by the Longshoremen's Act.

One other recent decision of this Court has considered the proper scope of Section 3(a) of the Longshoremen's Act. In *Pennsylvania R.R. Co.* v. *O'Rourke*, 344 U.S. 334, a freight brakeman was injured while releasing a brake on a railroad freight car that was located on a car float on navigable waters. The question was whether the Longshoremen's Act or the Federal Employers' Liability Act applied. In holding that the injuries were compensable exclusively under the Longshoremen's Act, this Court first stated that "New Jersey could not have enacted statutes granting compensation for respondent's injury on navigable water. Therefore respondent comes within the coverage of that portion of § 903(a) [Section 3(a) of the Act] that includes those outside the reach of state compensation laws." *Id.* at 337. The Court then ruled that the fact that the employee's duties were commonly regarded as "railroading" rather than those of longshoremen "misses the mark. The statute applies, by its own terms, to accidents on navigable waters when the employer has any employees engaged in maritime service." *Id.* at 339. The Court stated that the exclusive coverage of the Longshoremen's Act (*id.* at 340):

> extends to an employee of an employer, made liable by § 904, when he is injured, in the course of his employment, on navigable water. The Court of Appeals, we think, is in error in holding that the statute requires, as to the employee, both injury on navigable water and maritime

employment as a ground for coverage by the Compensation Act.

The Court thus held that, regardless of the nature of the individual employee's activity at the time of the accident, the Longshoremen's Act applied if the injury occurred upon navigable waters. The Court's statement that "respondent comes within that portion of §903(a) [Section 3(a)] that includes those outside the reach of state compensation laws" does not indicate that, if the injury is within the reach of such laws, the Longshoremen's Act cannot apply. On the contrary, that statement indicates that a portion of the Act's coverage under Section 3(a) also includes injuries which are within the reach of state workmen's compensation.[18] The appellate decisions relied on by the Court (344 U.S. at 339), such as *De Bardeleben Coal Corp.* v. *Henderson*, 142 F. 2d 481, and *Travelers Ins. Co.* v. *McManigal*, 139 F. 2d 949 (C.A. 4) (see *supra*, p. 49), further demonstrate that the Court was not holding that the federal Act was inapplicable to all injuries within the coverage of state workmen's compensation laws. For these appellate decisions upheld awards under the Act for injuries which,

[18] The court of appeals below has attempted to distinguish *O'Rourke* on the ground that the decision was based on the fact that the employee there was at the moment of his injury engaged in the traditional maritime employment of unloading cargo from a vessel. R. 53; *Flowers* v. *Travelers Ins. Co.*, 258 F. 2d 220, 223. While the facts in *O'Rourke* are perhaps susceptible to such a construction, we think that this Court's opinion makes it clear that the decision rested upon the locus of the injury being on navigable waters within admiralty jurisdiction and not upon the kind of work being done (see *supra*, p. 57). Similarly, the dissenting opinion was based upon the premise that O'Rourke was engaged in railroading, not in any maritime activity. 344 U.S. at 342–343.

prior to 1927, would have been compensable through state workmen's compensation under the "local concern" doctrine.[18a]

b. The Meaning and Effect of This Court's Decisions.—The principles announced and applied by the Court in *Davis, Avondale Marine Ways,* and *O'Rourke, supra,* appear to be controlling in favor of petitioners. These cases hold that an injury occurring on navigable waters (including a dry dock or marine railway) which is within admiralty jurisdiction is within the coverage of the Longshoremen's Act upon the election of the employee, whether or not the pre-Act precedents would permit recovery under state workmen's compensation legislation and regardless of the nature of the employee's activity at the moment of his injury. These principles are in accord with the legislative aim because, as we have shown above (pp. 31–45), Congress intended to exclude from the Act only those injuries in maritime employment which were beyond admiralty tort jurisdiction, but not those to which state law applied under the "local concern" doctrine. And as we will show (pp. 62–69), the principles so announced have provided clear guidance for the lower courts and have succeeded in avoiding

[18a] The court below relied upon *Kossick* v. *United Fruit Co.*, 365 U.S. 731, and *Hahn* v. *Rock Island Sand & Gravel Co.*, 358 U.S. 283, for the proposition that the "local concern" doctrine has retained its vitality (R. 51–52). There is no doubt, however, that the doctrine applies so as to allow state compensation to cover "local" injuries within maritime jurisdiction. The issue here, however, is the entirely different one whether injuries covered by state acts under the "local concern" doctrine are excluded from the coverage of the Longshoremen's Act.

costly and time-consuming litigation over the line between the state and federal compensation acts.

The decision in *Avondale Marine Ways*, upholding an award under the federal Act, shows that coverage under the Act is not foreclosed merely because the employee could now also be covered under a state compensation act, or because he could have been covered under a state act under the pre-1927 precedents. The present cases, in which the injuries occurred upon navigable waters, are obviously stronger cases for the applicability of the federal statute than the *Avondale Marine Ways* case. In the latter case, although the employee was injured while repairing a barge, the injury occurred while the employee and the barge were on land, on a marine railway approximately 400 feet from navigable waters. In *Avondale Marine Ways* as in the present cases, state law might validly provide compensation for the injuries under both the pre-1927 precedents and the more recent cases.

The court below attempted to distinguish *Avondale Marine Ways* on the ground that in the present cases there was "the categorical pre-1927 holding" in *Grant Smith-Porter Ship Co.* v. *Rohde*, 257 U.S. 469[19] (see *supra*, pp. 27–28), that a State may validly provide compensation for injuries sustained while working on an uncompleted ship upon navigable waters (R. 53). There was, however, a far more categorical

[19] We show below (pp. 74–76) that the *Rhode* decision was distinguishable from the situation presented here, and that therefore *Rohde* would have provided little guidance, even in 1927, as to whether the "local concern" doctrine would have upheld recovery under a state workmen's compensation act.

pre-1927 holding that a State may provide compensation for injuries sustained while performing maritime work upon land (*Industrial Commission* v. *Nordenholt Corp.*, 259 U.S. 263 (see *supra*, pp. 28–29, 56))—the precise situation which this Court held in *Avondale Marine Ways* was covered by the federal Act. Indeed, prior to 1927, an injury occurring in the performance of a maritime activity on land was within the *exclusive* jurisdiction of the State (*Industrial Commission* v. *Nordenholt*, *supra*), so that recovery for such injuries under state workmen's compensation laws was validly "provided by State law" (Section 3(a)) in and of itself rather than by supplementation of federal admiralty law through the "local concern" doctrine. On the other hand, state compensation for injuries upon uncompleted vessels on navigable waters, under *Jensen* and *Rohde*, could, at most, only be provided through the "local concern" doctrine of the federal maritime law.

The principles announced and applied in *Davis*, *Avondale Marine Ways*, and *O'Rourke*, have worked extremely well in practice. Perhaps the most forceful illustration of this has been the relatively few cases in which the issue of state versus federal coverage has been litigated[20] since their announcement, compared to the volume of litigation prior to that

[20] Since this Court's decision in *Avondale Marine Ways*, *supra*, in 1953, we have found only three federal appellate decisions outside the Fifth Circuit. *Morrison-Knudsen Co.* v. *O'Leary*, 288 F. 2d 542 (C.A. 9), certiorari denied, 368 U.S. 817; *Dixie Sand & Gravel Co.* v. *Holland*, 255 F. 2d 304 (C.A. 6); *Newport News Shipbuilding & Dry Dock Co.* v. *O'Hearne*, 192 F. 2d 968 (C.A. 4). The Fifth Circuit cases are *Flowers* v. *Travelers Ins. Co.*, 258 F. 2d 220, certiorari denied, 359

time.[21] One of the central purposes of both the state and federal workmen's compensation acts was to provide compensation "* * * without the delay and expense which an action at law entails." H. Rept. No. 1767, 69th Cong., 2d Sess., p. 20. This overriding legislative purpose, which was at the very heart of the *Davis* decision (317 U.S. at 254), has been largely achieved under the principles announced by this Court.

In contrast, under the construction of the Longshoremen's Act followed by the court of appeals here, the injured employee would be forced to thread his way through the maze of "local concern" decisions, preceding and contemporaneous with the Longshoremen's Act, to determine whether he should seek compensation under the state workmen's compensation act or the Longshoremen's Act. For under the court of appeals' decision, if the pre-1927 line was "clearly drawn" (R. 48–49) so as to make the injury compensable by state law under the "local concern" doctrine, the federal Act could not be applicable.[22] Apart

U.S. 920; *Noah* v. *Liberty Mutual Ins. Co.*, 267 F. 2d 218, setting aside 265 F. 2d 547; *T. Smith & Son, Inc.*, v. *Williams*, 275 F. 2d 397; and *Thibodeaux* v. *McDermott & Co.*, 276 F. 2d 42. Although we have not made an exhaustive survey of the state reports since 1953, the only state court cases since that date of which we are aware are *Ellis* v. *Travelers Ins. Co.*, 241 La. 433, 129 So. 2d 729, and *Stepter* v. *T. Smith & Son, Inc.*, 241 La. 465, 129 So. 2d 740. The Fifth Circuit and Louisiana cases must be attributed at least in part to the erroneous construction of the Longshoremen's Act first indicated in *Flowers* v. *Travelers Ins. Co.*, *supra*.

[21] Some hint of the number of cases on this subject during the thirties and forties may be seen from this Court's partial collection of authorities in *Davis* v. *Department of Labor*, 317 U.S. 249, 253.

[22] The decision of the court of appeals itself is not entirely clear on this point, but it apparently would give some scope

from the intent of Congress to provide an opportunity for federal relief for any injury within admiralty jurisdiction (see *supra*, pp. 31–45), the difficulty with the construction adopted by the court of appeals is that, as the pre-1927 cases show, a situation which is "clear" to one court is often very unclear to another (see *infra*, pp. 74–80). The recent experience in the Court of Appeals for the Fifth Circuit has demonstrated that that court's construction of the Longshoremen's Act will almost certainly lead, as it has in the Fifth Circuit,[23] to an increasing amount of litigation and a consequent increase in the delay and expense which the Longshoremen's Act and the state workmen's compensation acts were designed to avoid.

The adoption of the "clear" pre-1927 precedents as the basis for decision would create a series of arbitrary distinctions and anomalous results. Indeed, the opinion below concedes that it "may produce results that are extremely fine" (R. 54). For example, shipyard employees, such as the welders involved in these cases,[24] would not be covered by the Longshoremen's Act if they were working upon the launched hull of a new vessel still under construction, but would be covered if they momentarily happened to move over to do the same kind of work on the hull of completed

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to *Davis* and not deny recovery unless the pre-Longshoremen's Act precedents were deemed to be "clear" (R. 47–49).

[23] For the recent cases in that court, see *supra*, p. 61, note 20.

[24] Roger McGuyer, like other welders in his shipyard, would work on repair projects one day and on new vessels the next (R. 30). Although Minus Aizen had worked only on new construction in his short period of employment, construction workers at his yard would occasionally engage in repair work, and there is nothing in the record to indicate that his contract of employment was different in this respect from those of his coworkers (R. 87–88).

vessel undergoing repairs (R. 55). Yet, as we have shown above (pp. 32–36), those who drafted the coverage provision of the Act were apparently attempting to avoid this very anomaly. Similarly, under the interpretation adopted by the court of appeals below, injuries received on a marine railway on land are within federal coverage (*Avondale Marine Ways*), while injuries occurring upon an uncompleted vessel afloat upon navigable waters are within the exclusive coverage of state workmen's compensation laws (R. 53). Thus, the incongruous result would be that injuries on land which, prior to the Longshoremen's Act were held to be within the exclusive jurisdiction of state law (*Industrial Commission* v. *Nordenholt*, 259 U.S. 263 (see *supra*, pp. 28–29)), would be within the coverage of the federal Act. On the other hand, injuries on navigable waters which are within the traditional jurisdiction of federal maritime law—and where state acts are applied only under the "local concern" doctrine (*Grant Smith-Porter Co.* v. *Rohde*, 257 U.S. 469, 476 (see *supra*, pp. 27–28))—would be within the exclusive coverage of state workmen's compensation acts.

There is no justification in the language or the legislative history of the Longshoremen's Act, or in any decision of this Court for such results.[25] On the con-

[25] As noted above, Congress apparently accepted the then recognized line of demarcation between injuries at places within admiralty jurisdiction, and those within the jurisdiction of the States, and intended to exclude injuries on extensions of land. This line is supported by express legislative history and many years of judicial decision (see *supra*, pp. 31–58). The anomalies created by the theory adopted by the court of appeals below are supported by neither.

trary, the Court has recognized that workmen's compensation laws, including the Longshoremen's Act, are to be liberally construed to avoid anomalies. *Voris* v. *Eikel*, 346 U.S. 328; *Baltimore & P.S.B. Co.* v. *Norton*, 284 U.S. 408; see *Pillsbury* v. *United Engineering Co.*, 342 U.S. 197, 200. As this Court has stated in interpreting the Longshoremen's Act (*Voris* v. *Eikel*, *supra*, 346 U.S. at 333):

> This Act must be liberally construed in conformance with its purpose, and in a way which avoids harsh and incongruous results.[26]

4. The Decisions of the Courts of Appeals Hold That Injuries Within Federal Jurisdiction Are Within the Coverage of the Act

Except for the recent line of decisions in the Court of Appeals for the Fifth Circuit (see *supra*, p. 61, note 20), the principles announced and applied in *Davis*, *O'Rourke*, and *Avondale Marine Ways* have

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[26] Congress has accepted the principles and interpretation of the Longshoremen's Act announced and adopted by the Court. Not only has Congress revealed its acquiescence in these decisions by not changing the Act to overturn or modify them but it has on several instances amended and liberalized the Act without expressing any criticism or doubt as to this Court's interpretation of the coverage provisions. Act of June 24, 1948, 62 Stat. 602; S. Rept. No. 1315, H. Rept. No. 2095, and H. Conf. Rept. No. 2329, 80th Cong., 2d Sess.; Act of July 26, 1956, 70 Stat. 654; S. Rept. No. 853, 84th Cong., 1st Sess.; H. Rept. No. 2067, 84th Cong., 2d Sess.; Act of August 23, 1958, 72 Stat. 835; H. Rept. No. 2287, 85th Cong., 2d Sess.; Act of September 13, 1960, 74 Stat. 900; H. Rept. No. 2187, 86th Cong., 2d Sess. Since the coverage provisions of the Act were not affected by these amendments, the Committee reports did not discuss them in detail. However, one of the reports recognizes that, under the principles adopted by the Court, the Longshoremen's Act provides coverage for employees injured at places within federal maritime jurisdiction and excludes only injuries on land or extensions of land within the States' jurisdic-

been followed by the circuit courts. Since the *Davis* decision in December 1942, we have found no instance (prior to the decisions here) in which an employee injured upon navigable waters, and not upon an extension of land, has been denied recovery under the Longshoremen's Act by a court of appeals because the nature of his employment or activity at the time of his injury was a matter of "local concern." See Gilmore & Black, *Admiralty*, § 6–48, pp. 352–353; Note, *Overlapping Remedies for Injured Harbor Workers: Interaction on the Waterfront*, 67 Yale L.J. 1205, 1241–1244. On the contrary, the only decisions involving such activities have upheld awards of compensation under the Longshoremen's Act. *Travelers Insurance Co.* v. *McManigal*, 139 F. 2d 949 (C.A. 4); *Newport News Shipbuilding & Dry Dock Co.* v. *O'Hearne*, 192 F. 2d 968 (C.A. 4); *Dixie Sand & Gravel Co.* v. *Holland*, 255 F. 2d 304 (C.A. 6); *Morrison-Knudsen Co.* v. *O'Leary*, 288 F. 2d 542 (C.A. 9), certiorari denied, 368 U.S. 817; *De Bardeleben Coal Corp.* v. *Henderson*, 142 F. 2d 481 (C.A. 5).[27]

In *Travelers Insurance Co.* v. *McManigal, supra*, a carpenter was killed as a result of injuries received

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tion. In discussing the scope of the Act, H. Rept. No. 2287, 85th Cong., 2d Sess., p. 2, says that the Act:

> • • • provides compensation for injuries suffered by longshoremen, ship repairmen, ship servicemen and workers in related employment when they are working for private employers *within the Federal maritime jurisdiction on the navigable waters of the United States including dry docks.* These employees are subject to the protection of State safety standards when performing work on docks and other shore areas. [Emphasis added.]

[27] If *De Bardeleben* is, as it appears to be, a case involving an employment and activity of "local concern" it was overruled by the decision of the court of appeals below.

upon a structure which was in the process of being constructed into a dry dock. The employer contended that the employment, being construction, was not maritime, and that if it were maritime it was a matter of "local concern," so that the exclusive remedy for the injury was provided by state law. 139 F. 2d at 949. The Court of Appeals for the Fourth Circuit rejected that argument and held the Longshoremen's Act applicable. It refused to follow its 1933 ruling in *United States Casualty Co.* v. *Taylor*, 64 F. 2d 521, certiorari denied, 290 U.S. 639, which held that, since the Longshoremen's Act did not apply to injuries within the "local concern" doctrine, the Act was inapplicable to injuries to employees of an employer engaged in the construction of new vessels occurring upon navigable waters."[28]

The Fourth Circuit's rejection both of the *Taylor* decision and of the theory that the pre-1927 "local concern" cases demarcate the coverage of the Longshoremen's Act was made even clearer by *Newport News Shipbuilding & Dry Dock Co.* v. *O'Hearne*, *supra*, 192 F. 2d at 970–971. The court specifically reaffirmed its decision in the *McManigal* case and held that the Act covered an injury to a welder who was engaged in repairing a dry dock. While the case involved the repair rather than construction of a dry dock, the court stated generally that the Longshoremen's Act "should be broadly construed to cover any activity of a maritime nature in a dry dock in the same manner as if it occurred on navigable waters." *Id.* at 971.

[28] The court of appeals below recognized that the Fourth Circuit's *Taylor* decision is "no longer followed" by that court (R. 53, note 20).

In *Dixie Sand & Gravel Co.* v. *Holland, supra,* the Sixth Circuit ruled that an award could be made under the Longshoremen's Act for the death of an employee who slipped into the water and drowned while accompanying a night watchman on his rounds of gravel yards and moored barges, if the death arose in the course of his employment. Relying upon *Pennsylvania R. Co.* v. *O'Rourke,* 344 U.S. 334 (see *supra,* pp. 56–58), the court ruled that, since the employer, which concededly had employees engaged in maritime employment upon navigable waters, was an employer subject to the Longshoremen's Act, the employee's death upon navigable waters was covered by that Act whether or not he was engaged in maritime employment at the moment of his death. 255 F. 2d at 309.

In *Morrison-Knudsen Co.* v. *O'Leary, supra,* the Court of Appeals for the Ninth Circuit upheld awards under the Longshoremen's Act for the deaths of employees engaged in the construction of a dam on the Snake River, at a time when they were on a boat in a diversion tunnel, attempting to plug the tunnel. Although the principle dispute was whether the waters of the tunnel were navigable, the court of appeals also ruled that the employment was maritime in nature. The employer made no contention that only state workmen's compensation was applicable under the "local concern" doctrine apparently because the Ninth Circuit had so clearly ruled that that doctrine did not narrow the coverage of the federal Act. *E.g., Western Boat Bldg. Co.* v. *O'Leary,* 198 F. 2d 409 (C.A. 9).

The cases at bar are even more clearly within the coverage of the Longshoremen's Act than the *McMani-*

gal, Newport News, and *Morrison-Knudsen* cases above. Construction of a stationary object, such as a dry dock or dam, is more "local" and less "maritime" in nature than the construction of a vessel which has been launched but not completed. Compare *Cope* v. *Valette Dry Dock Co.*, 119 U.S. 625 (a dry dock is not within admiralty jurisdiction), with *Tucker* v. *Alexandroff*, 183 U.S. 424 (a structure becomes a ship, subject to admiralty jurisdiction, when launched). Thus, the *McManigal, Newport News,* and *Morrison-Knudsen* cases, as well as the *Dixie Sand* case, all hold that injuries within the "local concern" doctrine, and therefore within state compensation acts, are still within the coverage of the Longshoremen's Act.

5. The Administrative Practice Under The Act Is Inconclusive

The court of appeals placed considerable reliance on what it stated had been the administrative practice of the Deputy Commissioners, prior to 1959, to deny claims for compensation under the Longshoremen's Act by employees injured upon navigable waters while engaged in the construction of new vessels (R. 44–45). It is true that in 1927 an opinion of the Bureau of Employee's Compensation stated that injuries to employees "engaged in the construction of a vessel on land ways" were not within the coverage of the Longshoremen's Act (Opinion No. 7, September 2, 1927; see the Appendix, *infra,* pp. 83–84) [29] and that this ruling was apparently fol-

[29] The Bureau's practice of issuing opinions was discontinued in 1928.

lowed until 1959 (see the Appendix, *infra*, p. 88). The ruling, however, made no reference to the legislative history and acknowledged that there was "little justification" for the distinction, which it drew, between the repair and construction of a vessel. Moreover, the ruling clearly did not cover the situation presented here. Instead, it expressly applied to vessels which were on "land ways," *i.e.*, marine ways, prior to being launched, and the fact that admiralty jurisdiction attaches to vessels "when launched" was expressly recognized.

The only reported judicial decision which involved the denial by a Deputy Commissioner of a claim for recovery based on an injury on navigable waters was in *Taylor* v. *Lawson*, 60 F. 2d 165 (E.D. S.C.). The district court reversed the Commissioner's rejection of a claim for an injury sustained while the employee was working on the construction of a vessel which had been launched. The Fourth Circuit, however, reversed the district court. *United States Casualty Co.* v. *Taylor*, 64 F. 2d 521, certiorari denied, 290 U.S. 639. Any administrative practice since that time, must have been based, at least in part, upon that decision, which the court below recognized, is "no longer followed" in the court which rendered it (R. 53). See *supra*, pp. 66–67.[30]

[30] Since the employer in *Taylor* only built vessels and did not repair them, the position taken by the Deputy Commissioner in *Taylor* was not necessarily inconsistent with the positions taken by the Deputy Commissioners in these cases. 64 F. 2d at 525. Where the employees performed both construction and repair work, as here, their contracts are clearly maritime, while if they do only construction work, their contracts may

Except for the initial decision of the Deputy Commissioner in one of the two instant cases, we have found no other cases, except the discredited *Taylor* decision, in which a denial of a claim by a Deputy Commissioner for injury to a construction worker upon navigable waters had been challenged in the courts. Moreover, we have been unable to determine how many, if any, such claims have been denied administratively and not been individually challenged since that date, or since the authoritative interpretation of the Act by the Court in *Davis, O'Rourke,* and *Avondale Marine Ways, supra.* See Appendix, *infra,* p. 86. Thus, the administrative practice under the Act is, even if construed most strongly for respondents, inconclusive.

But even if the administrative practice were far clearer and stronger than it is in fact, we do not believe that this should prevent the removal of such anomolies as denying claims for injuries upon navigable waters within the admiralty jurisdiction occurring in the construction of vessels, while grant-

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be non-maritime. Since the non-maritime nature of the contract is one of the factors making the "local concern" doctrine applicable (see *infra*, pp. 75–76), it may be that the situation in *Taylor* was "clearly" within the "local concern" doctrine as defined by the pre-1927 cases. Therefore, under the reasoning of court below—that the Act excludes all injuries "clearly" within the "local concern" doctrine under the pre-1927 cases—the *Taylor* case was correctly decided. Here, on the other hand, even if we accept the standard of the court below, the "local concern" doctrine is not "clearly" applicable (see *infra*, pp. 74–80) and thus the case falls within the "twilight zone" where the claimant may elect to proceed under either the federal or state statute.

ing similar claims to the same employees for injuries incurred in the repair of completed vessels. A prior administrative ruling does not foreclose a change in interpretation, particularly where the change is made to correct a clear error in construing the Act. *Avondale Marine Ways* v. *Henderson*, 346 U.S. 366; *Automobile Club of Michigan* v. *Commissioner*, 353 U.S. 180; see also *Helvering* v. *Wilshire Oil Co.*, 308 U.S. 90. For example, prior to the Court's decision in *Avondale Marine Ways*, the government had accepted the decision of the Court of Appeals for the Third Circuit in *Norton* v. *Vesta Coal Co.*, 63 F. 2d 165, that injuries upon marine railways are not within the coverage of the Longshoremen's Act. Brief for Petitioner in No. 178, Oct. Term 1933. As a result of that acceptance the Court dismissed the previously granted writ of certiorari. 291 U.S. 641. This history, however, did not preclude the subsequent adoption of the contrary position by the Court in *Avondale Marine Ways* (see *supra*, pp. 55–56).

6. Section 5 of the Act Does Not Make State Compensation Laws the Exclusive Remedy Whenever They Apply

Section 5 (33 U.S.C. 905) states that the employer's liability under the Act is "exclusive." If this Section 5 were read literally it would mean that, in situations where both federal and state compensation acts could constitutionally apply, the state laws would no longer be applicable. Thus, the "local concern" doctrine would be in effect wholly rejected. But it is clear that Section 5 was intended merely to substitute compen-

sation under the Act for liability at common law or in admiralty. Like most of the rest of the Act, it was modeled upon a similar provision in the New York workmen's compensation act (see *supra*, p. 31) which presumably did not relate to the problem of conflicting state and federal jurisdiction—particularly since a state statute could not provide an exclusive remedy for an injury within federal jurisdiction. Moreover, there is nothing in the Congressional reports or debates to indicate that Section 5 was designed to foreclose recovery under state workmen's compensation acts.

While Section 5 does not, in our view, affect the applicability of state compensation laws, it is even clearer that it does not exclude coverage under the federal Act whenever a state law is applicable. There is nothing in the language of Section 5—which makes the federal Act the exclusive remedy—or in its legislative history to indicate that Congress intended the state acts to provide the exclusive remedy where the "local concern" doctrine of admiralty law would permit them to apply. If Section 5 were construed to bar application of the federal Act where state compensation acts were also applicable, this construction would be directly inconsistent with this Court's decisions in *Davis* and *Avondale Marine Ways*. Section 5 of the Longshoremen's Act must be read as simply providing that liability under the Act is in lieu of the liability imposed by common law and admiralty, and, in addition, that liability under state law is barred where the employee has elected to receive compensation under the Longshoremen's Act and the employer

has furnished it. See *Hahn* v. *Rock Island Sand & Gravel Co.*, 358 U.S. 272.

B. EVEN IF COVERAGE UNDER THE LONGSHOREMEN'S ACT DOES NOT EXTEND TO ALL INJURIES UPON NAVIGABLE WATERS WITHIN ADMIRALTY JURISDICTION, THE ACT APPLIED HERE BECAUSE THE INJURIES WERE WITHIN THE "TWILIGHT ZONE"

In our view, as we have contended above (pp. 23–74), the Longshoremen's Act, as shown by its history and the decisions of this Court, covers all injuries upon navigable waters within admiralty jurisdiction (with only two express exceptions), regardless whether such injuries were "clearly" compensable under state workmen's compensation acts under the "local concern" doctrine of admiralty law. Here we show that even if "clear" cases of "local concern" are not within the coverage of the Longshoremen's Act, the Act properly applied to the cases at bar, since these cases were far from clear and well within the area of legitimate doubt known as the "twilight zone."

1. There Is Substantial Doubt Under the Pre-1927 Precedents Whether State Workmen's Compensation Acts, as Supplementing Admiralty Law Under the "Local Concern" Doctrine, Would Apply to These Cases

The court of appeals below (R. 46–47) treated the injuries in these cases as clearly within the "local concern" doctrine under the pre-1927 cases, on the basis of *Grant Smith-Porter Ship. Co.* v. *Rohde*, 257 U.S. 469 (see *supra*, pp. 27–28). The decision in that case was based upon three factors: first, the employee's contract with his employer was held to be non-maritime because it related only to shipbuilding and incorporated

the state elective-type workmen's compensation; second, the employee's general employment had no direct relation to navigation or commerce; and third, his activity at the time of his injury was "local" in nature and had no direct relation to navigation or commerce. *Id.* at 475–476.

One of these three crucial elements is missing in the present cases. Whatever the situation in *Rohde*, the employees' contracts of employment in these cases cannot be considered as non-maritime. Since the employees were concededly subject to the Longshoremen's Act, there is no indication that the parties contracted with reference to the state workmen's compensation Act, as they had done in *Rohde*. Similarly, unlike the employer in *Rohde*, the employers here engaged in both the repair of completed vessels and the construction of new ones, and the employees here were engaged for both types of work.[31] Neither *Rohde*, nor any of the other pre-1927 "local concern" cases in this Court, dealt with employees who were employed both for repair and construction work, and were injured upon navigable waters at a time when they were engaged in the completion of a new vessel.[32] Recently

[31] Roger McGuyer was apparently expected to work interchangeably on new construction and repair projects (R. 29–30, 44). Although Minus Aizen was employed principally for new construction, he would be required on occasion to engage in repair work, although he had not done so in the few months of his employment prior to his injury (R. 87–88).

[32] Several pre-1927 cases made clear that state workmen's compensation acts could not apply under the "local concern" doctrine to injuries to repairmen occurring while they were working on completed vessels. *Great Lakes Dredge & Dock Co.* v. *Kierejonski*, 261 U.S. 479; *Gonsalves* v. *Morse Dry Dock Repair Co.*, 266 U.S. 171; *Robins Dry Dock & Repair Co.* v. *Dahl*, 266 U.S. 449 (see *supra*, pp. 29–30).

this Court held in *Pennsylvania R.* v. *O'Rourke*, 344 U.S. 334, 341–342, that the locus of the accident was controlling, regardless of the employee's activity at the moment of his injury, so long as the employer had employees engaged in maritime employment upon navigable waters. This case demonstrates the distinction between the cases at bar, where the employees engaged in repair work which was maritime employment, and the *Rohde* and other pre-1927 "local concern" decisions, where they engaged only in construction work which was held to be non-maritime. In short, the pre-1927 "local concern" cases revealed only that the application of that doctrine required a painstaking factual analysis of the impact in each case of state law on the uniformity constitutionally required.

In a case decided shortly after passage of the Longshoremen's Act, this Court did consider the issue whether workers employed both for repair and construction work came within the "local concern" doctrine when injured while they were engaged in the latter activity. In *Baizley Iron Works* v. *Span*, 281 U.S. 222, decided three years later, the Court held that an employee engaged primarily in work which was "local" in nature was still not covered by a state workmen's compensation law under the "local concern" doctrine, if his activity at the moment of injury was the maritime work of repairing a vessel. The Court in dictum appeared to suggest the contrary result—that the "local concern" doctrine would apply—where an employee, who engaged in both repair and construction work, was hurt doing con-

struction work. There is no reason to believe that Congress in 1927 could have and did anticipate this dictum, in view of the fact that the "local concern" cases turned upon their particular facts. See also *Messel Foundation Co.*, 274 U.S. 427, discussed *supra*, pp. 30–31.

In short, the pre-1927 precedents provide no clear guide for determining whether the injuries here were compensable under state workmen's compensation acts through the "local concern" doctrine, or were, like injuries occurring during the repair of completed vessels, exclusively under federal maritime law. Therefore, even if the court of appeals below were correct in believing that the "twilight zone," where both federal and state compensation acts were applicable, does not extend to cases clearly within the pre-1927 "local concern" precedents, the "twilight zone" does cover the cases at bar. For the pre-1927 precedents left room for reasonable and substantial doubt as to whether the "local concern" doctrine would permit recovery under local workmen's compensation acts for the injuries here.

2. Since the Legislative History of the Act and the Post-1927 Decisions of this Court, as well as of the Court of Appeals for the Fifth Circuit, Provided a Reasonable Basis for Believing That the Injuries Here Are Covered by the Longshoremen's Act, They Are Within the "Twilight Zone" of Overlapping Coverage

The decisions of this Court make it clear that the area of legitimate doubt concerning the coverage of federal and state compensation acts, *i.e.*, the "twi-

light zone," is not defined merely by determining whether there was doubt in 1927 under the pre-1927 precedents. Compensation under the Longshoremen's Act has been upheld as within the "twilight zone" in a situation where, prior to 1927, it was clear that workmen's compensation benefits could validly be provided by state law (compare *Industrial Commission* v. *Nordenholt Corp.*, 259 U.S. 263, with *Avondale Marine Ways* v. *Henderson*, 346 U.S. 366 (see *supra*, pp. 55–56)); and, conversely, compensation awards under state workmen's compensation acts have been upheld, as within the "twilight zone," for injuries which, prior to 1927, would have been within the exclusive domain of federal maritime law (compare *Gonsalves* v. *Morse Dry Dock & Repair Co.*, 266 U.S. 171, and *Robins Dry Dock & Repair Co.* v. *Dahl*, 266 U.S. 449, with *Bethlehem Steel Co.* v. *Moores*, 335 U.S. 874, and *Kaiser Co.* v. *Baskin*, 340 U.S. 886 (see *supra*, pp. 52–55)). Thus, the question is whether there was legitimate doubt as to the coverage of federal and state acts at the time of the injury and claim.

We believe, as we have contended above (pp. 23–74), that the legislative history of the Longshoremen's Act and the post-1927 precedents in this Court indicate that the Act covers all injuries, such as those here, occurring on navigable waters within admiralty jurisdiction. Even if we are incorrect in that regard, however, we think it beyond dispute that the legislative history and the prior decisions of this Court provided a

reasonable and substantial basis for the claims asserted by the claimants in these cases for injuries occurring within admiralty jurisdiction. No more need be shown to bring the injuries within the "twilight zone." *Moore's Case*, 323 Mass. 162, 167, 80 N.E. 2d 478, affirmed *sub nom. Bethlehem Steel* v. *Moores*, 335 U.S. 874.

But in the cases at bar more was shown. The Court of Appeals for the Fifth Circuit had ruled that cases within the "local concern" doctrine were nevertheless within the coverage of the Longshoremen's Act. *De Bardeleben Coal Corp.* v. *Henderson*, 142 F. 2d 481, 484; *Continental Casualty Co.* v. *Lawson*, 64 F. 2d 802, 804, 805. The only possible notice (prior to the decisions below) that lawyers practicing within that circuit had of a possible change of interpretation of the coverage provisions of the Act by the Fifth Circuit was a dictum contained in a footnote in *Flowers* v. *Travelers Insurance Co.*, 258 F. 2d 220, 222, note 5, certiorari denied, 359 U.S. 920. That footnote, however, did not cover the cases here, since it merely stated that the Act would not apply to "work on an uncompleted hull before it has become a ship" (*ibid.*), and it has long been settled that a hull becomes a ship subject to admiralty jurisdiction once it has been launched, even though it has not been completed. *Tucker* v. *Alexandroff*, 183 U.S. 424.[33] The claimants'

[33] The court of appeals below was of the view that *Thames Towboat Co.* v. *The Schooner "Francis McDonald"*, 254 U.S. 242, 244, "sharply restricted the *Tucker* case" (R. 54). However, the latter case merely held that a contract for the completion of a

reliance upon the prior rulings of the Court of Appeals for the Fifth Circuit was all the more reasonable in light of the unanimous opinion of the commentators and other courts that an election by a claimant to receive compensation under the Act for an injury upon navigable waters within admiralty jurisdiction would be sustained. See *supra*, p. 66.

Indeed, it is difficult to see how the court of appeals below could view these cases as *clearly* within the exclusive coverage of state law under the "local concern" doctrine. It is even more difficult to understand that characterization, when two Deputy Commissioners found the injuries within the coverage of the Longshoremen's Act, and two experienced trial court judges agreed. The "twilight zone" must extend to these cases, in order to protect the reasonable reliance of the claimants and to avoid the very dilemma for claimants which gave birth to this Court's decision in *Davis* v. *Department of Labor*, 317 U.S. 249.

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vessel which has been launched is not a maritime contract, although the work is to be performed on navigable waters.

CONCLUSION

For the foregoing reasons, we respectfully submit that the judgements of the court of appeals should be reversed, and the judgments of the district courts reinstated.

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MARCH 1962.

APPENDIX

Opinion No. 7, September 2, 1927

Employees engaged in the construction of a vessel in a dry dock or marine way are not engaged in maritime employment as that term is used in the longshoremen's and harbor workers' compensation act.

The question submitted is whether employees engaged in the construction of a vessel on land ways built on privately owned property in Tenn see have the right to claim compensation under the Tennessee compensation law or under the longshoremen's and harbor workers' compensation act.

The commission, in an opinion approved August 12, 1927, has held that a marine railway is a dry dock within the meaning of that term as used in the longshoremen's act. The courts have consistently held that a contract for the construction of a vessel is not a maritime contract. (Thames Towboat Company v. The Francis McDonald, 254 U.S. 242, and cases cited.) It is equally well settled that a contract for repairs to a vessel is a maritime contract. (Robins Dry Dock and Repair Co. v. Dahl, 266 U.S. 449.) It has also been held that a vessel becomes such when launched and is thereafter liable for maritime torts. (Grant Smith-Porter Co. v. Rohde, 257 U.S. 469.)

While there may be little justification from either an employee's or an employer's standpoint in drawing a distinction between the rights of an employee while engaged in the construction of a vessel in a dry dock and while engaged in the repair thereof in the

same dry dock at a later date, the decisions require that such distinction be made.

The United States Employees' Compensation Commission therefore will take no action under the longshoremen's act against an employer engaged only in the construction of vessels who does not comply with the act, nor against any employer engaged in the construction and repair of vessels who secures payment of compensation to employees while employed on repair work on a vessel in a dry dock or on marine ways.

U.S. DEPARTMENT OF LABOR
BUREAU OF EMPLOYEES' COMPENSATION
WASHINGTON 25, D.C.

January 25, 1962

Mr. Louis V. Nelson
Attorney at Law
Post Office Box 1632
Beaumont, Texas

Dear Mr. Nelson:

This is in response to your letter of January 11, 1962, in which you inquire concerning the Bureau's "administrative rulings regarding injuries upon new ship construction" in connection with administration of the Longshoremen's and Harbor Workers' Compensation Act. This apparently is in connection with a case which you have pending in the United States Supreme Court.

The Bureau (created in 1946 as successor to the United States Employees' Compensation Commission) does not issue "rulings" which determine the rights and obligations of parties in individual cases. The various deputy commissioners of the Bureau assigned

to the several compensation districts have the authority under the law to determine the legal and factual issues in each case under their jurisdiction. As stated, there is no general determination by the Bureau of individual rights and obligations.

A summary of this matter prepared by the legal staff of the Bureau shows that when the Longshoremen's Act was first enacted in 1927, the Employees' Compensation Commission issued "opinions." (The first opinion was issued on August 12, 1927, and the last, the thirty-third, on February 25, 1928.) They were issued in the absence of and until court decisions could construe the law. They were not "decisions" or "rulings." As a matter of fact, some of them subsequently were found to be inconsistent with the courts' rulings upon the same issue. For example, on February 25, 1928, an opinion was rendered that a woman living as the common-law wife of the deceased employee was entitled to compensation as his "surviving wife" notwithstanding that the state where the parties lived did not recognize common-law marriage. However, *Bolin* v. *Marshall*, 76 F. 2d 668 (C.A. 1935), held contra with reference to a common-law relationship in Oregon. It would also appear from this case that the "opinion" of the Commission of February 25, 1928, had been considered only as such by the deputy commisioner in the *Bolin* case since he had rejected the claim of the alleged widow for compensation contrary to the Commission's opinion.

With reference to the status of employees working on the construction of a vessel, the Commission on September 2, 1927, failing to distinguish between "contracts" and "injuries", opined that because "the courts have consistently held that a contract for the construction of a vessel is a non-maritime contract"

an injury to an employee engaged thereunder, notwithstanding that the injury occurred upon navigable waters of the United States where Admiralty law applies in the case of injury, was not within the coverage of the Longshoremen's Act. The same opinion stated that an injury to an employee engaged under a contract for the repair of a vessel would be covered although "there may be little justification * * * in drawing [such] distinction."

The deputy commissioners apparently continued to be guided by this opinion, which as stated above was not a rule or decision, until approximately 1959. The word "apparently" is used because there is no readily available method of ascertaining in how many cases the deputy commissioners actually rejected a claim for compensation because the injury was sustained while helping to construct a vessel or whether in some cases they awarded compensation in similar circumstances. No statistics are kept as to this. Only a search through the individual cases of the several deputy commissioners which run into the many thousands would elicit such information. It would not be feasible to undertake a study of this kind and it is noted that you desire the information at the earliest convenience.

You are aware, of course, of the case of *Taylor* v. *Lawson*, 60 F. 2d 165, wherein the United States District Court reversed the deputy commissioner's rejection of a claim for injury sustained while working upon the construction of a vessel, which judgment in turn was reversed by the United States Court of Appeals in 64 F. 2d 521.

When the Supreme Court in *Parker* v. *Motor Boat Sales, Inc.*, 314 U.S. 244, and more emphatically in *Pennsylvania Railroad Company* v. *O'Rourke*, 344 U.S. 334, held that maritime employment of the injured employee was not the *sine qua non* of applica-

bility of the Longshoremen's Act, provided the injury occurred upon navigable waters of the United States, the question of the correctness *vel non* of the earlier opinion was considered. It was concluded that injury upon navigable waters of the United States combined with maritime employment as to "any employees" of the employer (as defined in Section 2(4) of the Longshoremen's Act, 33 U.S.C. Sec. 902(4)) was sufficient to bring the case under the Act since the requirement of maritime employment as to the injured employee himself is nowhere provided in the Act. Whether "maritime employment" (either as to the injured employee or any other employees of the employer) is a condition precedent to recovery under the Act has been questioned. *Ford* v. *Parker*, 52 F. Supp. 98 (Md. 1943).

It is hoped that the above gives you the desired information.

Very truly yours,

WM. MCCAULEY, *Director.*

CC: U.S. Department of Justice
Washington 25, D.C.
Attn: Mr. Morton Hollander, Civil Division